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No. ———

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

SUSQUEHANNA VALLEY ALLIANCE, RONALD L. DAVIS, BETTY TOMPKINS, BEVERLY M. HESS, AND DOREEN E. SNELL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the trial court's decision that plaintiffs must exhaust their administrative remedies at the Nuclear Regulatory Commission before filing suit in federal court to challenge cleanup activities following the nuclear accident at Three Mile Island?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

General Public Utilities Corporation, Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1980.[1]

[1] In the court below, party-appellees other than Three Mile Island Nuclear Reactor who are not named in the above caption include the following: Nuclear Regulatory Commission, Joseph A. Hendrie, Herman Dieckamp, Walter M. Creitz, W. A. Verrochi and Shepard Bartnoff.

OPINIONS BELOW

The order of the court of appeals denying the petitions for rehearing *en banc* (App. A, pp. 1a-2a, *infra*) is not reported. The panel decision of the court of appeals (App. B, pp. 3a-29a, *infra*) is reported at 619 F.2d 231 (3d Cir. 1980). The decision of the district court dismissing the case (App. C, pp. 31a-42a, *infra*) is reported at 485 F. Supp. 81 (M.D. Pa. 1979).

JURISDICTION

The judgment of the court of appeals (App. B, at p. 30a, *infra*) was entered on March 17, 1980. The appellate court's order denying rehearing *en banc* (App. A, p. 1a, *infra*) was entered on May 12, 1980. By order dated August 4, 1980, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 9, 1980 (App. D, p. 43a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2239(a) and (b), United States Code, Title 42, provides in relevant part:

> (a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, * * *, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. * * *

> (b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended [28 U.S.C. § 2342] and in the provisions of Section 10 of the Administrative Procedure Act, as amended.

Section 2342(4), United States Code, Title 28, provides in relevant part:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of
>
> * * * *
>
> (4) all final orders of the Atomic Energy Commission made reviewable by Section 2239 of Title 42; * * *

STATEMENT OF THE CASE

On March 28, 1979, a serious nuclear accident occurred at Three Mile Island Nuclear Station, Unit 2 ("TMI"). The accident resulted in a significant amount of water in the plant becoming contaminated with radioactivity.

On May 25, 1979, the Susquehanna Valley Alliance and four individual plaintiffs ("SVA") commenced this action against the Nuclear Regulatory Commission ("NRC"), the owners and operators of TMI, and several named individuals in the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. §§ 1361, 1331, 1337, 33 U.S.C. § 1365(a)(2) and 5 U.S.C. §§ 704 and 706. SVA sought declaratory and injunctive relief aimed at preventing defendants from treating and eventually disposing of the radioactive wastewater.

The complaint specifically alleged that the NRC approved petitioners' construction and operation of a facility to decontaminate intermediate-level radioactive wastewater from the accident, known as EPICOR II, and planned to allow the processed water from EPICOR II to be discharged into the Susquehanna River in violation of: (1) the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et. seq.*; (2) the Atomic Energy Act, 42 U.S.C. §§ 2011 *et. seq.*, and various NRC regulations; (3) Section 301(f) of the Federal Water Pollution Control Act, as amended, ("the Clean Water Act"), 33 U.S.C. § 1311 (f); and (4) plaintiffs' constitutional right "to be born and to live mentally and physically unimpaired." More generally, the complaint asked the district court to enjoin all present and future efforts to decontaminate the radioactive wastewater pending defendants' compliance with the statutes listed above and the U.S. Constitution.

The complaint did not allege that SVA exhausted its administrative remedies and it is undisputed that at no time prior to filing suit did SVA seek relief from the NRC.

At the time of filing the complaint, SVA also moved for a temporary restraining order prohibiting any treatment and discharge of radioactive wastewater at TMI on the ground that such activities threatened imminent harm to the community. The district court denied the motion upon being advised that the NRC had issued a Statement on May 25, 1979, prohibiting wastewater treatment and discharge pending prepara-

tion of specified environmental assessments.[2] *See,* App. E, *infra.*

The NRC and petitioners thereafter moved to dismiss the complaint on the ground that SVA had failed to exhaust its administrative remedies. SVA did not dispute the availability of administrative procedures and remedies, but rather argued that exceptions to the exhaustion doctrine excused it from pursuing these remedies. The issue was fully briefed and, on October 12, 1979, the district court granted the motions and ordered the case dismissed. *See,* App. C, *infra.*

The district court began its analysis by determining whether an administrative remedy was available to SVA. It found that the NRC has provided an administrative procedure in 10 C.F.R. § 2.206 which "allows

[2] Following the May 25, 1979 Statement, the NRC was involved over the next several months in the administrative process of preparing an environmental assessment regarding the operation of EPICOR II, soliciting public comment on the assessment and analyzing the comments received. An administrative record of several hundred pages was compiled. On October 16, 1979, the NRC issued a Memorandum and Order directing petitioners to begin to decontaminate the intermediate-level radioactive wastewater through use of EPICOR II, but expressly prohibiting any discharge of the processed water pending further environmental study. See App. F, pp. 46a-60a, *infra.*

SVA requested the United States Court of Appeals for the Third Circuit to stay this limited decontamination order pending appeal, which request was denied on October 18, 1979. On December 13, 1979, SVA filed with the Third Circuit a petition for review of the NRC's October 16 order pursuant to the Administrative Orders Review Act, 28 U.S.C. § 2342. *See, Susquehanna Valley Alliance* v. *Nuclear Regulatory Commission, et al.,* No. 79-2800 (3d Cir.). The Third Circuit Court is currently holding that separate appeal in abeyance pending disposition of this appeal. Order dated February 15, 1980.

plaintiffs to ask NRC for all the relief sought in this court." App. C, at p. 36a. The district court noted that Congress has specifically provided that NRC decisions resulting from this procedure are subject to judicial review, 42 U.S.C. § 2239, and that review lies exclusively in the federal courts of appeals. 28 U.S.C. § 2342.[3] *Id.* at 37a. The district court then carefully analyzed SVA's arguments as to why it should be excused from pursuing its administrative remedies and concluded that "[t]he exceptions to the exhaustion doctrine do not apply to the facts of this case." *Id.* at 42a. Accordingly, the motions to dismiss were granted "[b]ecause plaintiffs have failed to exhaust their administrative remedies". *Id.*

An appeal was taken by SVA to the Third Circuit Court of Appeals. On March 17, 1980, Judge Gibbons, writing for the appeal panel, affirmed in part and reversed in part, ordering all but the Atomic Energy Act count of the complaint reinstated. The appellate court ruled that SVA was not required to exhaust its administrative remedies before the NRC insofar as its challenge to the proposed cleanup activities was based on alleged violations of NEPA, the Clean Water Act, and the U.S. Constitution. Petitions for rehearing with a request for rehearing *en banc* filed by both the NRC and petitioners were denied on May 12, 1980. App. A, pp. 1a-1b.

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[3] As acknowledged by the Third Circuit below (App. B, p. 10a, *infra*), the statutory procedure assigning exclusive judicial review to the courts of appeals does not leave unattended the public's possible need for judicial intervention while a matter is still under agency consideration. In such event, the allegedly aggrieved party can seek *pendente lite* relief from the court of appeals pursuant to 28 U.S.C. § 2349(b) and 1651(a).

REASONS FOR GRANTING THE WRIT

The Failure Of The Court Of Appeals To Require Plaintiffs To Exhaust Their Administrative Remedies Before The NRC Is In Direct And Irreconcilable Conflict With The Decisions Of This Court And Other Courts Of Appeals

This Court in *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U.S. 41, 50-51, 58 S.Ct. 459, 463 (1938), said that, in the absence of special circumstances, "... no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." The United States Court of Appeals for the Third Circuit, in a single stroke, has now effectively emasculated this established principle of judicial restraint. The Third Circuit ruled in this case that notwithstanding the availability of a prescribed administrative remedy, and in the absence of any special circumstances, these plaintiffs need not exhaust their administrative remedies before filing suit in federal district court.

If the decision below is left uncorrected by this Court, it threatens to flood the federal courts with a wave of duplicative litigation involving highly technical and complex issues heretofore regarded as properly reserved for agency review in the first instance. With the current caseload of our federal judiciary already reaching staggering proportions, this Court can ill-afford to allow so serious an erosion of the exhaustion doctrine to go unrepaired.

By failing to adhere to established exhaustion principles, the decision below creates unwarranted and unnecessary interruption of established administrative processes. The practical result of this decision is to create a chaotic overlap between the NRC and the

courts. The Third Circuit has decreed that the NRC, the district court and the court of appeals will now all exercise concurrent jurisdiction over the same claims at the same time. This overlapping of judicial and administrative review, with the courts assuming jurisdiction over matters within the jurisdiction of an agency before the agency has rendered a final decision, and doing so in the absence of any demonstrable reason for such intervention, leads to the very "Kafkaesque" situation condemned by this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 557, 98 S.Ct. 1197, 1218 (1978).

The panel's decision seriously misconceives the very limited role Congress prescribed for the judiciary in matters of nuclear energy regulation. *Vermont Yankee, supra,* 435 U.S. at 557-58, 98 S.Ct. at 1218-19. It effectively removes from judicial analysis the element of agency expertise and experience in nuclear matters which both Congress and the courts have recognized as critical to a proper resolution of the complex considerations in this area.

The gist of SVA's Complaint is that the NRC is approving construction of decontamination facilities by petitioners and plans to allow the processed water from those facilities to be discharged into the Susquehanna River without properly evaluating the health and safety implications of such actions. Such a cause of action is aimed directly, and exclusively, at activities relating to the operation of a nuclear power plant. As such, it unmistakeably comes under the administrative review responsibility of the NRC pursuant to federal statute. *See* Atomic Energy Act, 42 U.S.C. §§ 2012, 2013, 2201. Indeed, it is difficult to think of matters better tailored to NRC jurisdiction than the

development and implementation of appropriate clean-up activities in response to the most severe accident to occur in this country at an NRC licensed nuclear facility.

The Third Circuit correctly held that SVA's claims in Count II of the complaint—involving allegations that the cleanup efforts violated the Atomic Energy Act, certain of the NRC's implementing regulations, and the TMI Unit 2 operating license—must be brought before the agency in the first instance, and all administrative remedies exhausted before judicial review can be obtained. (*See* App. B, at pp. 7a-14a, *infra*). What is remarkable, and unprecedented, is that the Third Circuit then carved out for separate treatment the allegations contained in the remaining counts of the complaint involving the same cleanup efforts and bestowed plenary jurisdiction on the district courts to review them simultaneously with ongoing administrative review by the NRC.[4]

The remaining counts do not challenge any different activity than that which is the subject of the Atomic Energy Act count of the complaint. To be sure, the *grounds* for objection differ in the various counts.

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[4] Except perhaps as to the alleged constitutional claims, the result below was not premised on any finding that judicial intervention was compelled due to the threat of immediate, irreparable injury. Indeed, both the district and appellate courts below were requested by SVA to grant emergency relief based on a claimed threat of irreparable injury—and each declined to do so. Nor was the result below premised on a finding that SVA lacked an available administrative remedy. The utility of the 10 C.F.R. 2.206 procedure recognized by the district court below is well established. *See e.g*, *Honicker* v. *Hendrie*, 465 F. Supp. 414, 417 (M.D. Tenn. 1979), *dismissed on the opinion below*, 605 F.2d 556 (6th Cir. 1979), *cert. denied* —— U.S. ——, 100 S.Ct. 1015 (1980).

Thus, SVA asserts as additional reasons for barring water decontamination efforts at TMI (1) that the NRC has not undertaken a proper environmental assessment under NEPA (Count I), (2) that operation of decontamination facilities would violate the Clean Water Act (Count III), and finally (3) that NRC authorization to commence the cleanup activities will jeopardize certain of SVA's constitutional rights (Count IV).

Each of these contentions is a proper matter for agency consideration under the review authority delegated to the NRC by the Atomic Energy Act.

NEPA directs the involved agency, not private parties or the federal courts, to undertake an environmental assessment of major federal action. 42 U.S.C. § 4332 (2)(c). This is a function which has been fully recognized as within the province of the NRC's licensing responsibility. *See* 10 C.F.R. § 51.1 to .56; *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971).

This Court has recognized that review of the adequacy of NRC compliance with NEPA in licensing actions lies solely in the courts of appeals pursuant to 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council Inc.,* 435 U.S. 519, 526-27, 98 S.Ct. 1197, 1203 (1978). The decision below cannot be reconciled with this aspect of *Vermont Yankee* and is squarely in conflict with *Grand Canyon Dorries, Inc.* v. *Walker,* 500 F.2d 588 (10th Cir. 1974), and *City of Rochester* v. *Bond,* 603 F.2d 927 (D.C. Cir. 1979).

In *Grand Canyon Dorries, Inc.,* the Court of Appeals for the Tenth Circuit held that the manner and

extent to which particular agency action is subject to the requirements of NEPA must be decided in the first instance by the responsible agency, and district courts thus should not entertain jurisdiction over NEPA claims before the agency has made its own determination "whether and how NEPA should be applied." 500 F.2d at 590.[5] In *City of Rochester*, the Court of Appeals for the District of Columbia Circuit

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[5] The NRC's action under NEPA was specially noted by the district court below (App. C at pp. 33a, 34a), but unaccountably ignored by the court of appeals, although a matter of record (compare App. B, at p. 16a n.10). Thus, on the day plaintiffs filed this action, May 25, 1979, the NRC issued a directive to its staff to prepare a NEPA environmental assessment of the EPICOR II wastewater decontamination system. As part of this assessment, the NRC staff recommended on August 14, 1979, that the EPICOR II *processing* of intermediate-level radioactive wastewater would not significantly affect the quality of the human environment, and thus under NEPA, this limited activity could commence without the need for an environmental impact statement. *Disposal* of processed wastewater, as well as both processing and disposal of high-level radioactive wastewater, was to await the staff's further environmental study. Following public comment on this recommendation, an order was issued by the NRC on October 16, 1979, permitting EPICOR II processing *only* of intermediate-level radioactive wastewater at TMI Unit 2. *See* App. F, at p. 58a.

Interestingly, this agency action in the October 16, 1979 Order is the subject of a separate appeal (involving identical parties) currently pending in the Third Circuit pursuant to 42 U.S.C. § 2239. It raises the same NEPA claims regarding segmentation and inadequate environmental review that are involved in the instant case filed in the district court. *See* n. 2, *supra*. Nevertheless, the Third Circuit has now remanded the same issues to the District Court. Thus, two courts, as well as the NRC, will be exercising concurrent jurisdiction over the same NEPA issues. This sort of procedural chaos is inevitable and is bound to be repeated if the Third Circuit's failure to apply the exhaustion doctrine is left unchanged. Moreover, it will increase the undesired prospect of inconsistent results and undermine efforts to achieve judicial economy to the fullest extent possible.

was all the more emphatic. It held that, where the statutory review procedure assigns to the courts of appeals exclusive review responsibility over agency action—as does the Atomic Energy Act—a district court may *not exercise concurrent jurisdiction* to resolve allegations of *non-compliance with NEPA*. 603 F.2d at 936-37. *And see Natural Resources Defense Council* v. *Nuclear Regulatory Commission,* 606 F.2d 1261, 1265 (D.C. Cir. 1979). The decision below runs counter to both propositions.

Nor is it on any firmer footing with respect to the disposition of SVA's claim under the Clean Water Act. The NRC has *exclusive* jurisdiction to regulate the discharge of certain types of radioactive waste (source, byproduct, and special nuclear materials) from nuclear plants. *See Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 16-17, 96 S. Ct. 1938, 1945 (1976). The types of radioactive discharges not subject to NRC's exclusive jurisdiction are materials like "radium and accelerator produced isotopes" (426 U.S. at 8 & 11, 96 S.Ct. at 1941 & 1943)—materials not involved in this proceeding. The NRC, as an integral part of its administrative review of the proposed cleanup activities, must necessarily ascertain whether the water to be disposed after processing will in fact be "high level radioactive waste" within the meaning of Section 301(f) of the Clean Water Act, as SVA claims in Count III of its complaint. That is precisely the sort of technical fact determination which can best be made in the first instance by the agency which has special competence and expertise to evaluate such matters.

The Third Circuit's excuse for not requiring exhaustion of administrative remedies as to this issue is

that the Clean Water Act provides citizens with a private right-of-action which ostensibly permits SVA to litigate its Clean Water Act claim simultaneously in the district court. *See* App. B, at pp. 20a-25a. The Third Circuit's reasoning is seriously flawed in at least two respects.

First, the referenced statutory right-of-action is available to SVA only if the challenged discharge of processed wastewater is subject to regulation under the Clean Water Act by the Environmental Protection Agency ("EPA") or a state permitting authority. Since, as indicated above, the wastewater to be discharged here is of a type subject to the exclusive regulatory jurisdiction of the NRC under the Atomic Energy Act, it is, as this Court stated in *Train,* "beyond the reach" of the Clean Water Act (426 U.S. at 22, 96 S.Ct. at 1948).[6] Accordingly, the citizens' suit provision of the Clean Water Act is not available in this case and provides SVA no excuse for failing to exhaust available administrative remedies at the NRC.[7]

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[6] As this Court explained in *Train*, "to have included these materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme embodied in the AEA." 426 U.S. at 24, 96 S.Ct. at 1948. That scheme requires, as acknowledged by the Third Circuit below, that a party first go before the NRC and exhaust his administrative remedies and then seek review only in a court of appeals pursuant to 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342. This Court in *Train* noted Congress' intent that "the exclusive regulatory scheme created by AEA for source, byproduct, and special nuclear materials was to remain unaltered" by the Clean Water Act. 426 U.S. at 17, 96 S.Ct. at 1945. Surely, Congress' inclusion of a citizens' suit provision in the Clean Water Act was not intended to alter implicitly the explicit review process prescribed by Congress in the Atomic Energy Act.

[7] This conclusion is confirmed by the structure and content of the citizens' suit provision. Section 505(a)(2), 33 U.S.C. § 1365

Second, even assuming *arguendo* that the private right of action pertains here, the citizens' suit provision, by its own terms, is only applicable where an *actual* violation of an effluent standard is alleged. Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1). Here, by contrast, no discharge of wastewater has occurred or has even been alleged. Thus, there cannot yet have been a violation of Section 301 (f), regardless of the composition of the wastewater proposed to be discharged. In such circumstances, a citizens' suit under the Clean Water Act is premature—precisely the situation sought to be avoided by the exhaustion doctrine.

Agency review of SVA's constitutional claims also should not be interrupted. SVA does not challenge the constitutionality of the Atomic Energy Act itself, in which case there might well have been reason not to apply the exhaustion doctrine. *See Honiker* v. *Hendrie,* 465 F. Supp. 414, 417 (M.D. Tenn.), *dismissed on the opinion of the district court,* 605 F.2d 556 (6th Cir. 1979), *cert. denied,* —— U.S. ——, 100 S.Ct. 1015 (1980). Rather, the alleged constitutional violations arise out of the very activities which are subject to

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(a)(2), authorizes a citizens' suit against the Administrator of EPA for failure to perform a nondiscretionary duty. In this instance, however, the Administrator has no authority over the challenged discharge and such a suit would be meaningless. Significantly, the citizens' suit provision nowhere authorizes a suit against the NRC for failure to enforce the Section 301(f) prohibition. Similarly, Section 505(b)(1), 33 U.S.C. § 1365(b)(1), requires sixty days' prior notice to the Administrator of EPA and the appropriate state—neither of which in this instance has authority to regulate or prohibit the discharge in question. It is thus apparent that in drafting the citizens' suit provision Congress never intended to authorize private actions in the federal district courts with respect to matters within the exclusive regulatory jurisdiction of the NRC.

NRC approval and regulation. By statute, the agency is obligated to protect the public from radiological hazards to its health and safety. 42 U.S.C. § 2201(i)(3). In meeting that responsibility, it necessarily must ensure that the activity under review does not jeopardize citizens' fundamental right to life and liberty guaranteed by the United States Constitution.

The court below apparently accepted the general applicability of the exhaustion doctrine with respect to such constitutional objections to particular agency action, but it ruled that "plaintiffs' present allegation of irreparable harm to their constitutional right to 'life and liberty' meets the irreparable harm" exception to the exhaustion doctrine. App. B, at p. 27a, *infra*. On the most cursory analysis, it can be seen that SVA's assertion that operation of EPICOR II or other decontamination facilities will present a hazard to health and safety of a constitutional dimension simply recasts in different terms the essential objections to the proposed water cleanup activities already aired in the first three counts. The threat of irreparable harm, such as it is, does not attach immediately, as both the district court and the court of appeals fully recognized in refusing SVA's requests below for emergency relief. Rather, the perceived harm that is the subject of concern—whether expressed in constitutional or other terms—relates to operation of decontamination facilities and the disposal of wastewater following its decontamination.

That activity must await final agency action, including a full environmental assessment under NEPA and opportunity for public comment thereon. There are in such circumstances sound public policy reasons which admonish against premature adjudication by the courts

of constitutional law questions before opportunity has been afforded to the agency to develop a factual record for meaningful review. As stated in *Babcock & Wilcox Co.* v. *Marshall,* 610 F.2d 1128, 1137-38 (3d Cir. 1979):

> Requiring the exhaustion of administrative remedies also ensures the most efficient use of judicial resources because the Review Commission will develop a factual record so that, if the court must decide on constitutional grounds, it will be able to do so with the benefit of a full factual context. If the [administrative] tribunal decides favorably to the aggrieved party on nonconstitutional grounds, the court will find it unnecessary to proceed with constitutional adjudication.

Accord, Marshall v. *Whittaker Corp.,* 610 F.2d 1141, 1148 (3d Cir. 1979). The above reasoning is fully applicable to the present case.

All the elements suggesting the need for Supreme Court review are present in this case. The decision of the Third Circuit Court of Appeals is clearly in error insofar as SVA was not first required to exhaust its administrative remedies before the NRC. The radioactive wastewater cleanup activities following the March 28, 1979 nuclear accident fall squarely within the jurisdiction of the NRC and are best dealt with in the first instance by that agency which has special competence and expertise in the subject matter. By permitting SVA to circumvent agency review and pursue its NEPA, Clean Water Act and constitutional claims in the district court, the decision below contradicts established precedents in the Third, Tenth and District of Columbia Circuits.

This Court has admonished against "premature interruption of the administrative process." *McKart* v.

United States, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662 (1969). That admonition has uncompromising force where—as here—Congress has by statute assigned to a particular agency principal review responsibility over matters within that agency's regulatory jurisdiction and has limited judicial review of the final administrative decision to the courts of appeals. The Third Circuit's departure in this case from the statutory review procedure in the Atomic Energy Act forebodes an opening of the district courts to untold claims heretofore recognized as better resolved in the first instance by the NRC—claims which, for the most part, the district courts have neither the expertise nor specialized competence to deal with on an informed and meaningful basis. This result finds support in neither legal precedent nor public policy, and requires correction by this Court.

CONCLUSION

Accordingly, this petition for a writ of certiorari should be granted.

Dated: September 9, 1980.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 1980 a copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit was served by deposit in the United States mail, first class, postage prepaid, upon the following:

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2446

SUSQUEHANNA VALLEY ALLIANCE, DAVIS, RONALD L., TOMPKINS, BETTY, HESS, BEVERLY M., SNELL, DOREEN E.,
Appellants,

v.

THREE MILE ISLAND NUCLEAR REACTOR, GENERAL PUBLIC UTILITIES, METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., NUCLEAR REGULATORY COMMISSION, HENDRIE, JOSEPH A., DIECKAMP, HERMAN, CREITZ, WALTER M., VERROCHI, W. A., BARTNOFF, SHEPARD,

Appellees

(D. C. Civil No. 79-0658)

SUR PETITIONS FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petitions for rehearing filed by Three Mile Island Nuclear Reactor, General Public Utilities, Metropolitan Edison Company, Jersey Central Power & Light Co., Pennsylvania Electric Co., Nuclear Regulatory Commission, Joseph A. Hendrie, Herman Dieckamp, Walter M. Creitz, W. A. Verrochi and Shepard Bartnoff in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges

of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,
/s/ JOHN J. GIBBONS
Judge

Dated: May 12, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 79-2446

SUSQUEHANNA VALLEY ALLIANCE, Davis, Ronald L., Tompkins, Betty, Hess, Beverly M., Snell, Doreen E.,

Appellants,

v.

THREE MILE ISLAND NUCLEAR REACTOR, General Public Utilities, Metropolitan Edison Company, Jersey Central Power & Light Co., Pennsylvania Electric Co., Nuclear Regulatory Commission, Hendrie, Joseph A., Dieckamp, Herman, Creitz, Walter M., Verrochi, W. A., Bartnoff, Shepard,

Appellees.

Argued November 13, 1979

Decided March 17, 1980

Albert J. Slap (argued), Public Interest Law Center of Philadelphia, Philadelphia, Pa., Jean Royer Kohr, Minney, Mecum & Kohr, Lancaster, Pa., Larry B. Selkowitz, Widoff, Reager, Selkowitz & Adler, Camp Hill, Pa., for appellants.

George F. Trowbridge, Mark Augenblick, Thomas A. Baxter (argued), Shaw, Pittman, Potts & Trowbridge, Washington, D. C., for private appellees.

Leonard Bickwit, Jr., Gen. Counsel, Stephen F. Eilperin (argued), Sol., E. Leo Slaggie, Stephen S. Ostrach, Attys., U. S. Nuclear Regulatory Commission, Washington, D. C., Sanford Sagalkin, Acting Asst. Atty. Gen., Peter R. Steenland, Jr., Chief, Appellate Section, Jacques B. Gelin, Atty., Land and Natural Resources Division, U. S. Dept. of

Justice, Washington, D. C., for appellee Nuclear Regulatory Commission.

Before GIBBONS, HIGGINBOTHAM and SLOVITER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

The Susquehanna Valley Alliance, an unincorporated association of residents of Lebanon, York, and Lancaster Counties in the Commonwealth of Pennsylvania dedicated to preservation of the environment of the Susquehanna River, and four Lancaster County residents, (collectively the Alliance) appeal from an order dismissing their complaint seeking injunctive and declaratory relief for lack of subject matter jurisdiction. We conclude that the complaint states some claims over which the district court has jurisdiction, and we will reverse.

I. Proceedings in the District Court

The defendants are the Nuclear Regulatory Commission (NRC), Joseph A. Hendrie, its Chairman, General Public Utilities and several of its subsidiaries, who own and operate Unit 2 of the Three Mile Island Nuclear Power Station at Middletown, Dauphin County, Pennsylvania (collectively the Operators) and several officers of the Operators. The complaint alleges, and it is conceded by all parties, that on March 28, 1979, an accident at Unit 2 made it necessary to bring that Unit to a cold shutdown, and that as a result of the shutdown 600,000 gallons of water, contaminated by a high level of radioactive waste, have accumulated in the reactor containment building and 250,000 gallons of water contaminated by an intermediate level of radioactive waste have accumulated in the Unit's auxiliary

building and associated tanks.[1] The complaint alleges that the defendants have planned an attempt to partially decontaminate the water and threaten to release this water eventually into the Susquehanna River, where because of the proposed decontamination system's technological limitations it will contaminate both municipal water systems and fish and other wildlife used by the plaintiffs for food. More specifically, the complaint alleges that NRC has authorized the Operators to purchase, erect, and begin the operation of a system, known as Epicor II, for treatment of contaminated water. The system will decontaminate the water by passing it through resin beds in which isotopes other than hydrogen and oxygen will bind to the resin, while the decontaminated water will be discharged. Thus, the radioactive isotopes will be trapped in resin beds while the non-binding hydrogen and oxygen will be discharged.[2] The complaint alleges that there is no known technology available to maintain the integrity of the resin beds and that if they disintegrate radioactive waste materials will be discharged into the river or the air. While the Operators propose to treat only the intermediate level radioactive water by means of the Epicor II system, that water is alleged to contain "high-level radioactive waste" within the meaning of section 301(f) of the Federal Water Pollution Control Act (FWPCA),[3] which prohibits discharge of such waste into the navigable waters of the United States. Moreover, the complaint alleges, neither the Operators nor the NRC have any overall plan to deal with the entire

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[1] It is further conceded that approximately 100,000 gallons of high level radioactive waste water have accumulated in the reactor's primary cooling system, from which approximately 1,000 to 1,500 gallons per day is leaking into the containment building.

[2] *See* Office of Nuclear Reactor Regulation, Nuclear Regulatory Comm'n, *Use of EPICOR-II at Three Mile Island, Unit 2* §§ 3.3, 5.1-5.2 (Aug. 14, 1979).

[3] 33 U.S.C. § 1311(f) (1976 & Supp. I) (also referred to by the short title of Clean Water Act of 1977).

contaminated water problem, or any feasible plan for disposal of the highly radioactive resin residue which Epicor II will produce. Finally, it is alleged that because the contaminant building and the auxiliary building are presently secure there is no immediate necessity for putting the Epicor II system into operation.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1361, 1331, and 1337 as well as 33 U.S.C. § 1365(a)(2) and 5 U.S.C. §§ 704, 706. The complaint alleges the jurisdictional amount required by 28 U.S.C. § 1331. Plaintiffs' complaint charges that the actions and inactions of the NRC and the actions of the Operators have given rise to four substantive claims. Count I charges violations of section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361, 4332 (1976), and of a provision of the Operators' operating license requiring that the licensee, before engaging in additional construction or operational activity, prepare and record an environmental evaluation of such activity. Count II charges violations of various provisions of the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. I), regulations of the NRC issued pursuant to that Act, and the Operators' license. Count III charges violations of section 301(f) of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(f). Count IV alleges that the action of the NRC permitting the Operators to discharge radioactive waste violates plaintiffs' rights under various provisions of the United States Constitution.

The district court, without separately analyzing the four Counts of the complaint, concluded that the relief requested was unavailable from any source other than the NRC, that the plaintiffs had failed to exhaust administrative remedies before that agency, and that the court lacked subject matter jurisdiction. The complaint thus was "dismissed for lack of subject matter jurisdiction, but without

prejudice to plaintiffs' right of recourse to the [NRC]."[4] Since the order appealed from dealt only with whether the complaint stated any cause of action within the subject matter jurisdiction of the district court, we must first consider that question with respect to each count.[5] Although the complaint pleads the violation of the National Environmental Policy Act of 1969 as the first Count, we think that the interaction of several federal statutes upon which the parties rely can better be understood by commencing our discussion with the alleged violations of the Atomic Energy Act.

II. The Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. I)

The Energy Reorganization Act of 1974, Pub.L.No.93-438, 88 Stat. 1233, *codified in relevant part at* 42 U.S.C. § 5841, *reprinted in* [1974] U.S.Code Cong. & Admin.News, 1401, established the Nuclear Regulatory Commission (NRC) and transferred to it the licensing jurisdiction over private nuclear power plants originally created in the Atomic Energy Act of 1954, Pub.L.No.83-703, §§ 1, 101-110, 68 Stat. 919, 921, 936-39, *codified at* 42 U.S.C. §§ 2011, 2131-2140, and which were formerly exercised by the Atomic Energy Commission. The Act as amended authorizes the NRC to prescribe regulations "to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life and prop-

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[4] *See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 485 F.Supp. 81, 88 (W.D.Pa. 1979).

[5] A panel of this court, on October 17, 1979, denied a motion by appellants for injunctive relief pending appeal. In view of our disposition on the merits of the district court's jurisdictional ruling, that court is free to consider any application for preliminary injunctive relief which may be brought before it.

erty." 42 U.S.C. § 2201(i)(3) (1976 & Supp. I). The NRC has adopted regulations setting forth procedures for imposing requirements by order, or for modification, suspension, or revocation of licenses. 10 C.F.R. §§ 2.200-.206 (1978). As currently codified, the Act provides for hearings in any proceedings "for the granting, suspending, revoking, or amending of any license or construction permit." 42 U.S.C. § 2239(a). Finally, the Act provides that

> [a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

Id. § 2239(b). The Act of December 29, 1950, referred to in the quoted provision, is the Administrative Orders Review Act, which provides in relevant part that

> [t]he Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
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> . . . . .
>
> (4) All final orders of the Atomic Energy Commission [6] made reviewable by section 2239 of title 42 . . .

28 U.S.C. § 2342 (footnote added). NRC contends that its consideration of the problem of disposing of contaminated water at Unit 2 is a license proceeding falling within section 2239(a). It urges that the judicial review provision in section 2239(b) is an exclusive remedy, that no final order has yet been entered in that proceeding, and that in the

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[6] Since the NRC is now exercising certain of the powers formerly exercised by the Atomic Energy Commission, 42 U.S.C. § 5841 (1976), this provision gives the court of appeals jurisdiction over the NRC's orders that are reviewable under 42 U.S.C. § 2239.

absence of a final order no court can review its action or inaction. The allegations of the complaint, however, are to the effect that the Operators threaten construction and operation of the Epicor II system without the required license or construction permit and therefore in violation of the Atomic Energy Act. Thus, fairly read, the complaint seeks more than judicial review of incomplete agency action; it seeks to enjoin activity of the licensee said to violate the Act and to endanger the health of the community. Recognizing this, NRC contends that it is the sole tribunal authorized to entertain a charge of such a violation. It points to its regulation, 10 C.F.R. § 2.206, which authorizes any person to file a request with the Director of Nuclear Material Safety and Safeguards, or the Director, Office of Inspection and Enforcement, to institute a proceeding to modify, suspend or revoke a license or take such other action as may be proper. NRC thus argues that the Alliance must first seek administrative relief under section 2.206 and that once NRC's final order in that proceeding is issued, the exclusive review provision of section 2342, 28 U.S.C. § 2342, will govern. Moreover, NRC suggests, this exclusive review mechanism is adequate to protect the public even from pendente lite harm, since a reviewing court also has the power to issue interlocutory injunctions. 28 U.S.C. § 2349(b).

It is true that section 2349(b) permits the court of appeals to grant pendente lite relief, but that power exists only in cases over which the court has jurisdiction. It has jurisdiction only over final orders of the agency, however, and thus section 2349(b) affords no authority for the court of appeals to grant relief in order to prevent irreparable injury before the agency gets around to taking action. The Alliance charges that the Operators are in violation of the Act and about to cause irreparable injury, and that NRC has done nothing to prevent that injury. If NRC is correct in arguing that only it can consider the the charge of a violation of the Act in the first instance,

and that review under the Administrative Orders Review Act is exclusive, then the unavailability of pendente lite relief during the time when the agency has the case under consideration would seem, superficially, to leave a large gap in the protection available to the public. However, that gap appears to be filled by the All Writs Act,[7] for in *FTC v. Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), the Supreme Court held that section 1651(a) authorized courts of appeals to issue preliminary injunctions preserving the status quo, pending final agency action, of matters over which, by virtue of section 11(c) of the Clayton Act, 15 U.S.C. § 21(c) (1976), they had exclusive review jurisdiction. 384 U.S. at 604-05, 86 S.Ct. at 1742-43. The *Dean Foods* analysis appears to be equally applicable to cases before the NRC. Thus the Alliance could have asked NRC to act, *see* 10 C.F.R. § 2.206(a), and could have asked the appropriate court of appeals to grant pendente lite relief while NRC considered the case.

The pendente lite relief available under 28 U.S.C. §§ 2349 (b) and 1651(a), while it makes the NRC argument for absence of district court jurisdiction more palatable, does not decide the question. In other instances in which there was exclusive jurisdiction in the court of appeals under the Administrative Orders Review Act this court has reserved decision on the question whether a district court may entertain cases challenging the timeliness of agency action. *City of Trenton v. FCC*, 441 F.2d 1329, 1333 & n.8 (3d Cir. 1971); *Bucks County Cable TV, Inc. v. United States*, 427 F.2d 438, 442 (3d Cir.), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 61 (1970); *see Citizens for a Safe Environment v. Atomic Energy Comm'n*, 489 F.2d 1018, 1022-23 (3d Cir. 1974) (expressing no view as to whether Com-

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[7] 28 U.S.C. § 1651 (1976). That Act provides in relevant part that the courts of appeals "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* § 1651(a).

mission's order could be reviewed in district court proceeding for injunctive, declaratory or mandamus relief). Tacitly, at least, we have assumed that despite the exclusive jurisdiction language in 28 U.S.C. § 2342 there may be room for district court relief which did not amount to judicial review of a final agency order. We have not heretofore considered whether, since relief against the Agency is available in the court of appeals under the All Writs Act, we should countenance any erosion of the exclusivity provision. Nor have we considered whether, when an agency has jurisdiction to consider a claim that the Act it is charged with enforcing has been violated, there may still be judicial enforcement against the alleged violator, rather than against the agency. Certainly, however, the answer to the latter question is not to be found in the exclusivity provision. 28 U.S.C. § 2342. For if there is a substantive cause of action available against violators in a non-agency forum, the exclusive review provision of that statute would not apply to the actions of that forum. Rather, the inquiry must be whether the statutory scheme has expressly or impliedly confined enforcement to a single agency, precluding relief in a non-agency forum.

The statutory scheme in issue authorizes no person or agency other than the NRC to grant, suspend, revoke or amend a license to operate a nuclear power reactor, 42 U.S.C. § 2239(a). But that section does not in so many words say that a license suspension proceeding is the only method of enforcing the prohibitions of the Act. Peculiarly, however, there are found in the subchapter of the Atomic Energy Act dealing with enforcement, 42 U.S.C. §§ 2271-2282, provisions not called to our attention by any of the parties, which appear to preclude private enforcement. The enforcement subchapter provides for three types of enforcement: criminal prosecutions, *id.* §§ 2272-2278b; injunction actions, *id.* § 2280; and civil penalties, *id.* § 2282. Obviously criminal enforcement is entirely in the hands of the government. *Id.* §§ 2271(b), 2271(c). The civil penalty

provision, which was added by the Atomic Energy Act Amendments of 1969, Pub.L.No.91-161, § 4, 83 Stat. 444, authorizes the Commission to impose such penalties in the first instance, 42 U.S.C. § 2282(a), while their collection is by a civil action instituted by the Attorney General at the Commissioner's request. *Id.* § 2282(c). As to the injunctive remedy, the Act, as currently codified, provides:

> Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

Id. § 2280. The statutory setting for the Commission's authority to request injunctive relief must, however, be read in conjunction with section 221(c), the general enforcement provision of the Act, *id.* § 2271(c), which provides:

> No action shall be brought against any individual or person for any violation under this chapter unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States . . . *And provided further,* That nothing in this subsection shall be construed as applying to administrative action taken by the Commission.

Id. The injunctive relief provision first appeared in section 16(c) of the Atomic Energy Act of 1946, Pub.L.No.585,

§ 16(c), 60 Stat. 755. It authorized the Atomic Energy Commission to commence suits for injunctive relief. In the Atomic Energy Act of 1954, the injunctive remedy was carried forward in section 232, but the authority to sue was given to the Attorney General. Atomic Energy Act of 1954, Pub.L.No.83-703, § 232, 68 Stat. 959. The general prohibition against suits by anyone other than the Attorney General first appeared in section 221(c) of the 1954 Act. *Id.* § 221(c), 68 Stat. 958. The final proviso, excepting administrative action by the Commission from that prohibition, was added when the Act was amended in 1969. Atomic Energy Act Amendments of 1969, Pub.L.No.91-161, § 5, 83 Stat. 444.

We have not found very much by way of legislative history illuminating the reasons for the adoption of section 221(c).[8] But the meaning of that section's language prohibiting judicial enforcement by anyone other than the Attorney General or administrative enforcement by the Commission (now the NRC with respect to private nuclear power reactors) seems plain. "No action shall be brought against any individual or person for any violation . . . except by the Attorney General of the United States." 42 U.S.C. § 2271(c). The only exception for private enforce-

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[8] The Senate Report which accompanied the Senate version of the bill states, with respect to section 221(c):

> No action may be brought for any violation of the act until the Attorney General has advised the Commission with respect to such action. All actions are required to be brought by the Attorney General as the legal representative of the Commission before the courts. In those cases involving the death penalty, action may be brought on the express direction of the Attorney General himself.

S.Rep. No. 1699, 83d Cong., 2d Sess. *reprinted in* [1954] U.S. Code Cong. & Admin.News 3456, 3485-86. The two Conference Committee reports make no reference to section 221. *See* H.R.Conf. Rep.No. 2639, 83d Cong., 2d Sess. *reprinted in* [1954] U.S.Code Cong. & Admin. News 3529; H.R.Conf.Rep.No.2666, 83d Cong., 2d Sess. *reprinted in* [1954] U.S.Code Cong. & Admin. News 3534.

ment appears to be the opportunity to participate in the NRC's administrative proceeding as provided in the Commission's regulations and seek judicial review under section 2239(a). *See* 10 C.F.R. § 2.206 (1978) (permitting any person to request initiation of commission proceedings to revoke, suspend, modify or take other action with respect to an operator's license). It is true that the "no action" language in section 221(c) is not couched in jurisdictional terms. *Compare* 42 U.S.C. § 2271(c) *with* the Norris-LaGuardia Act, § 1, 29 U.S.C. § 101 (1976). But it is also true that Count II seeks relief which under the enforcement scheme of the Atomic Energy Act a district court may not afford to a private litigant. Returning that Count to the district court for the entry of a dismissal under Fed.R.Civ. P. 12(b)(6), rather than under Fed.R.Civ.P. 12(b)(1), would be a futile exercise. The dismissal of Count II must be affirmed because it fails to state a claim upon which relief may be granted.

III. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976)

Turning to Count I, which charges defendants with violations of section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361, 4332 (1976), we note at the outset that the statute is directed toward the activities not of private parties but of the federal government. Thus although Count I alleges that the Operators have violated the provisions of their Operating License for Unit 2 by failing to provide a written evaluation of the environmental impact of their actions, Complaint ¶ 80, that allegation adds nothing of substance to the charge that the National Environmental Policy Act has been violated.[9] Indeed

[9] The National Environmental Policy Act's requirement that an environmental impact statement be prepared is directed at the agencies of the federal government, not at private parties. *See* National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

the analysis we have made in Part II, *supra*, compels the conclusion that the district court may not consider the alleged violation of the Operating License. The sufficiency of Count I must be determined by the allegations that are directed against NRC.

The NRC has recognized its obligation to comply with the National Environmental Policy Act by promulgating regulations governing licensing and regulatory policy and procedures with respect to environmental protection. *See* 10 C.F.R. §§ 51.1 to .56 (1978). The NRC requires applicants for construction or operation permits to file an environmental report. *Id.* § 51.20. A draft environmental impact statement is then prepared by the NRC staff and is distributed to appropriate federal agencies and published in the Federal Register. *Id.* §§ 51.22 to .25. After comments have been received, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards or their designee prepares a final environmental impact statement. Both the draft statement and the final statement accompany the application through the NRC review process. *Id.* § 51.26. The regulations recognize that the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards may determine that no environmental impact statement need be prepared for a particular action, but provide that any party to an NRC proceeding may take a position and offer evidence on the aspects of the proposed action claimed to fall within the Act. *Id.* §§ 51.5(c), 51.50(d), 51.51(b)(1). The adequacy of NRC compliance with the National Environmental Policy Act in any license proceeding is reviewable in the court of appeals pursuant to 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526-27, 98 S.Ct. 1197, 1203-04, 55 L.Ed.2d 460 (1978) (final decision of AEC with respect to licensing and compliance with National Environmental Policy Act requirements is reviewable in court of appeals under 28 U.S.C. § 2342 and 42

U.S.C. § 2239); *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93 (1st Cir. 1978) (final environmental impact statement of NRC is reviewable).

What the Alliance charges in this suit is that NRC, by fragmenting its consideration of the problem of disposing of the contaminated water in Unit 2, and authorizing the erection and operation of Epicor II to dispose of the intermediate level contaminated water, without preparation or consideration of either a draft or a final environmental impact statement, has frustrated the Act and violated NRC's plain statutory duty.[10] Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful.[11] Thus the legal issue presented by Count I is whether, despite the availability of review

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[10] The NRC, in resisting the grant of an injunction pending appeal disputed that charge, contending that it had directed its staff to prepare a draft environmental impact statement. It is not disputed, however, that NRC gave the Operators oral approval to begin the installation of Epicor II, without awaiting the preparation of that draft statement.

[11] *E.g., City of Rochester v, United States Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976) ("To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact, would provide a clear loophole to NEPA."); *Scientists' Inst. for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1086 n.29, 1086-89 (D.C.Cir. 1973) (statement required for overall project where individual actions are related logically or geographically). *See generally* W. Rodgers, Environmental Law §§ 7.7, 7.9 (1977) (discussing problems arising from scope and timing of environmental impact statements). The Supreme Court, however, has made clear that there is no affirmative obligation to regionalize a proposal under NEPA; a project of genuinely small scope of course would not be an impermissible segmentation. *See Kleppe v. Sierra Club*, 427 U.S. 390, 399-402, 96 S.Ct. 2718, 2725-2726, 49 L.Ed.2d 516 (1976) (no obligation to prepare impact statement as to regional effects where no regional action proposed).

in the court of appeals when the NRC issues a final order, the district court has jurisdiction to compel compliance with the National Environmental Policy Act by prohibiting such segmentation.

Enforcement of the environmental impact statement requirement generally has been assumed to be within the subject matter jurisdiction of the district courts. *E.g., Flint Ridge Dev. Co. v. Scenic Rivers Ass'n.*, 426 U.S. 776, 782-83, 96 S.Ct. 2430, 2435, 49 L.Ed.2d 205 (1976); *Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972). Moreover, the analysis of the enforcement subchapter of the Atomic Energy Act in Part II, *supra*, is inapplicable. Count I is not directed to a violation of that Act, but to a violation of the National Environmental Policy Act of 1969, and private enforcement of that statute has been the rule. Whatever were the policy reasons for concentrating enforcement of the Atomic Energy Act in the hands of the Attorney General, they do not apply to Count I.

Where, however, an agency provides an opportunity for private parties to intervene and raise the issue of the necessity for preparation of an environmental impact statement, and where both review and pendente lite relief can be obtained in the court of appeals, it would not be an unreasonable construction of the Administrative Orders Review Act, 28 U.S.C. § 2342, that enforcement of the National Environmental Policy Act against that agency is available only in the court of appeals. That is the construction which is sought by NRC. In *Scientists' Institute for Public Information, Inc. v. AEC (SIPI)*, 481 F.2d 1079 (D.C.Cir. 1973), the Court of Appeals for the District of Columbia Circuit held that the district court could, and should, entertain an action to enforce the environmental impact statement requirement against the Atomic Energy Commission, to which the same review scheme applies. In that case Judge Wright gave considerable attention to the significance of timing of

the impact statement. *Id.* at 1093-98. The Alliance makes the valid point that when by fragmentating its consideration the NRC postpones preparation of an impact statement until after private parties have been permitted to expend large sums on construction, the resulting change in the status quo has the almost inevitable effect of distorting the later view of both the agency and the reviewing court as to the desirability of the action in question. *See Calvert Cliffs' Coord. Comm. v. AEC,* 449 F.2d 1109, 1127 (D.C. Cir. 1971) (AEC should not be permitted to foreclose alternative solutions by delaying environmental impact statements). Although the Supreme Court has repudiated the list of factors relevant to timing that was enumerated by Judge Wright in *SIPI, see Kleppe v. Sierra Club,* 427 U.S. 390, 403-06, 96 S.Ct. 2718, 2727-28, 49 L.Ed.2d 516 (1976), and has described NEPA's requirement that an environmental impact statement be prepared as "precise," *id.* at 406, 96 S.Ct. at 2728, the significance of the timing decision cannot be ignored. Like other agencies, NRC must be afforded some flexibility with respect to timing of the preparation of impact statements. *See Aberdeen & Rockfish R. R. Co. v. SCRAP,* 422 U.S. 289, 320, 95 S.Ct. 2336, 2355, 45 L.Ed.2d 191 (1975) (preparation of statement required by statute once proposal submitted); *Westinghouse Elec. Corp. v. NRC,* 598 F.2d 759, 776-78 (3d Cir. 1979) (National Environmental Policy Act permits NRC to defer statement preparation pending policy decision); *New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87, 93-94 (1st Cir. 1978) (agency not required to revise statement when proposal revised). But the timing problem is a real one especially when private parties are permitted by a federal agency to make major construction expenditures in advance of consideration of environmental issues. The Supreme Court in *Kleppe* held that once the agency, here the NRC, is presented with a proposal, as in the instant case, then the impact statement must be prepared. 427 U.S. at 405-06, 96 S.Ct. at 2728, *quoting Aberdeen & Rockfish R. R. Co. v.*

SCRAP, 422 U.S. at 320, 95 S.Ct. 2336; *see Kleppe v. Sierra Club*, 427 U.S. at 419 n.1, 96 S.Ct. at 2734 n.1 (Marshall, J., concurring in part and dissenting in part) (majority opinion does not permit agency to delay preparation of statement once proposal submitted). Thus the NRC does not have unfettered discretion, and the real issue before us is whether the court of appeals or the district court can consider the claim that such a course of action should not be permitted.

It is conceivable that the All Writs Act, 28 U.S.C. § 1651, as interpreted in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), may authorize the court of appeals to enforce timely compliance with the National Environmental Policy Act with respect to agency proceedings that it may ultimately review. Another conceivable approach is to hold that whenever NRC takes any action having the effect of permitting a licensee to commence construction of any facility there is a final order within the meaning of 42 U.S.C. § 2239(b). Neither approach seems desirable. In many instances determination of when an impact statement should be prepared will require a record. While the court of appeals can devise procedures for the preparation of a record in a section 1651 proceeding, the district court has both procedures and facilities at hand for that task. Thus resort to the more ordinary remedy of a suit for declaratory or injunctive relief, or to the mandamus remedy authorized by 28 U.S.C. § 1361 seems preferable to inviting litigation here. The approach of treating any NRC action which permits a licensee to do anything as a final order, aside from the problems arising from the absence of a record, poses the additional problem of proliferation of litigation over what agency action is final for purposes of review. *See Westinghouse Elec. Corp. v. NRC*, 598 F.2d at 768 n. 35. This is not a case in which the administrative record is complete and a final order has undoubtedly been made. *E.g., Natural Resources Defense Council, Inc. v. NRC*, 606 F.2d 1261, 1264-66 (D.C.Cir. 1979).

We conclude, therefore, that a claim that NRC is not complying with the National Environmental Policy Act states a cause of action over which the district courts have subject matter jurisdiction, and that dismissing Count I for lack of subject matter jurisdiction was error. Our holding that there is subject matter jurisdiction over Count I should not be construed as an indication that the requested relief, injunctive or declaratory, should be granted. It may be that NRC will convince the court that its fragmentation of the contaminated water problem was entirely proper, or at least within the range of permissible agency discretion on the timing of environmental impact statements. It may be appropriate, moreover, for the district court to stay its hand pending further agency proceedings, while retaining jurisdiction. These are issues which on the present record are not before us. Nor on this record do we have any occasion to determine what effect the NRC's November 21, 1979 Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement may have on the proper disposition of Count I.

IV. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. I)

In Count III the Alliance charges that the Operators are threatening to violate section 301(f) of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, 1311(f) (1976 & Supp. I), which provides:

> Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

Id. § 1311(f).

In dealing with Count III the district court ruled:

> Count III, which is tenuous at best because it is based on a possible future action, is also subject to the exhaustion principle.

With no further analysis, the court concluded that it lacked subject matter jurisdiction over Count III. But the prohibition in section 301(f) is absolute; NRC has no discretion to consider whether or not to permit a prohibited discharge. Moreover the Federal Water Pollution Control Act, in sharp contrast with the Atomic Energy Act, provides expressly for private enforcement. *See* 33 U.S.C. § 1365 (citizens' suit provision). Section 505(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) provides:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard . . . or to order the Administrator to perform such act or duty, as the case may be. . .

This type of citizens' suit provision is similar to those included in a number of federal environmental statutes.[12]

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[12] Toxic Substances Control Act, §§ 20, 21, 15 U.S.C. §§ 2619, 2620 (1976); Surface Mining Control and Reclamation Act of 1977; § 520, 30 U.S.C. § 1270 (1976 & Supp. I); Marine Protection, Research, and Sanctuaries Act of 1972, § 105, 33 U.S.C. § 1415 (1976); Deepwater Port Act of 1974, § 16, 33 U.S.C. § 1515 (1976); Safe Drinking Water Act, § 2(a), 42 U.S.C. § 300j-8 (1976 & Supp. I); Noise Control Act of 1972, § 12, 42 U.S.C. § 4911 (1976); Resource Conservation and Recovery Act of 1976, § 2, 42 U.S.C. § 6972 (1976 & Supp. I); Clean Air Amendments of 1970, § 12(a), 42 U.S.C. § 7604 (1976 & Supp. I).

Like each of those statutes, the citizens' suit provision in the Federal Water Pollution Control Act states that no such action may be brought prior to sixty days after the plaintiff has given notice of the alleged violation to the Administrator of the agency responsible for the enforcement of the standard allegedly violated, in this case the Administrator of the Environmental Protection Agency (EPA). Federal Water Pollution Control Act Amendments § 505(b), 33 U.S.C. § 1365(b). In *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), the Supreme Court addressed the issue whether the Administrator of the EPA could, under the Federal Water Pollution Control Act, regulate discharges into navigable waters of nuclear waste materials which were subject to regulation under the Atomic Energy Act. There the Court held that the three types of radioactive material defined in the Atomic Energy Act [13] were subject to regulation by the NRC rather than by the EPA. Id. at 25. We do not decide today whether, on the merits, plaintiffs can prove that the threatened discharges from Three Mile Island are radioactive wastes within the scope of the Federal Water Pollution Control Act. We hold only that plaintiffs' allegations under that Act were sufficient for the purpose of subject matter jurisdiction.

The complaint alleges that two days prior to the filing of the complaint the Alliance gave the required notice both to the Administrator of EPA and to the NRC. There are exceptions in section 505(b) to the 60-day notice requirement with respect to violations of sections 306 and 307(a) of the statute, 33 U.S.C. §§ 1316 and 1317(a). There is no exception, however, to the waiting period for radioactive waste discharged in violation of section 301(f), 33 U.S.C.

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[13] The Atomic Energy Act regulates three types of radioactive materials: special nuclear material, source materials, and byproduct material. 42 U.S.C. §§ 2014(e), 2014(z), 2014(aa); *see* 42 U.S.C. §§ 2021a, 2022 (disposal of waste).

§ 1311(f). We have been referred to no legislative history revealing why high-level radioactive waste, which many people would consider ultrahazardous, was not included among the exceptions to the waiting period. Appellants have urged that the omission was somehow inadvertent, and that we should read the exceptions as applicable. We decline to do so. While we are puzzled by the omission we are not free to rewrite the statute.

NRC has taken before this court a rather pragmatic approach to the 60-day notice provision. It observes:

> The 60-day notice provision in Section 505(b) of the Clean Water Act, 33 U.S.C. [§] 1365(b) is in the nature of a statutorily mandated jurisdictional exhaustion requirement designed to afford an agency an opportunity to pass upon claims of alleged violations of the Clean Water Act prior to a citizens' suit to enforce the Act's effluent limitations. While plaintiffs' suit, filed 2 days after mailing notice, was therefore premature, dismissal for failure to observe the 60-day condition of 33 U.S.C. [§] 1365(b) would serve no purpose. The Agencies, EPA and [NRC], were in fact given an opportunity to respond to plaintiff's Clean Water Act claim and did so prior to judicial disposition of the complaint. Both found the Clean Water Act claim to be without merit. . . . It would have been excessive formalism for the district court to have required Count III of the complaint to have been re-filed on July 23 in order to accommodate the 60-day notice provision.

Supplemental Brief for Appellee Nuclear Regulatory Commission at 4. The Operators make no such concession. They contend that premature suits should be dismissed for lack of jurisdiction even if at the time when the district court acts upon the motion to dismiss the responsible agency has had notice for sixty days.

We agree with NRC that reading section 505(b) to require dismissal and refiling of premature suits would be excessively formalistic. At the time the district court acted, on the face of the complaint it appeared that NRC had had notice of the alleged violation under consideration for more than sixty days. Certainly, then, the complaint alleged a claim over which the district court had subject matter jurisdiction under section 505(a), 33 U.S.C. § 1365(a).

Moreover, as we recently held in *National Sea Clammers Association v. City of New York*, 616 F.2d 1222 (3d Cir. 1980), the savings clause in the citizens' suit provision, 33 U.S.C. § 1365(e), has independent significance preserving private causes of action for persons who can allege the requisite jurisdictional amount for jurisdiction under 28 U.S.C. § 1331. The complaint pleads the jurisdictional amount and general federal question jurisdiction under section 1331. It charges that the plaintiffs will be injured in fact by the discharge of radioactive waste into the Susquehanna River. Reading the complaint as a whole, it is clear that Count III states a claim within the subject matter of the district court entirely apart from the Federal Water Pollution Control Act's citizens' suit provision. 33 U.S.C. § 1365(a). *See National Sea Clammers Ass'n v. City of New York*, 616 F.2d at 1227-1228.

Thus we hold that the district court erred in dismissing Count III for lack of subject matter jurisdiction. The NRC and the Operators, perhaps anticipating that result, urge that the dismissal should nevertheless be affirmed for failure to state a claim upon which relief may be granted. Their theory is that NRC has authority to enforce the Federal Water Pollution Control Act with respect to radioactive discharges from nuclear power reactors, and that the doctrine of exhaustion of administrative remedies prevents a district court from considering this complaint. This argument is a variant of that which we discussed in Part II, *supra*, that the alleged violation of section 301(f), 33 U.S.C.

§ 1311(f), can be considered by the court of appeals when it reviews a final order of the NRC.

There is no room for that argument in the enforcement scheme of the Federal Water Pollution Control Act. The citizens' suit provision in section 505, 33 U.S.C. § 1365, contains its own specification of the degree to which district courts must defer to administrative agencies. Under the plain language of that section, the district courts should defer for sixty days, and at that point determine whether or not the violation has been halted by administrative action or otherwise. If it has not been so halted, the citizen's suit goes forward. It does not wait in what may be a perpetual limbo while the agency decides whether or not to take action. A similar analysis applies to the private causes of action preserved by section 505(e), 33 U.S.C. § 1365(e). The very fact that the savings clause was inserted suggests that there was no intention on the part of Congress to deprive parties actually injured by conduct violating the Act of access to conventional legal remedies such as damages or injunctive relief. NRC has no authority to grant relief which would make such parties whole, and we would have to find rather compelling evidence of congressional intent before we would hold that there was no opportunity to resort to either preventative or make-whole judicial remedies while that agency considered the underlying problem. That is not to suggest that when the district court considers this case for injunctive and declaratory relief on the merits a great deal of deference to NRC's expertise may be inappropriate. But we can approve dismissal of Count III on the theory that it fails to state a claim upon which relief may be granted only if we can fairly conclude that at final hearing the Alliance could prove no set of facts upon which either form of relief would be warranted. We cannot do so. Since Count III states a claim within the subject matter jurisdiction of the district court upon which at final hearing some relief might be given the order dismissing that Count was error.

V. Constitutional Claims

In Count IV the Alliance charges that NRC, by allowing effluents from Unit 2 in excess of those permitted by the operating license, violated various provisions of the Constitution, to plaintiffs' injury in that they have been exposed to the risk of cancer and genetic damage. The district court dismissed this claim for lack of subject matter jurisdiction on the theory that since NRC could consider the same claim, exhaustion of administrative remedies and resort to court of appeals review under section 2239(b), 42 U.S.C. § 2239(b), was required.

Certainly a complaint alleging a cause of action for private relief implied from provisions of the United States Constitution states a claim within the subject matter of the district court. *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.2d 939 (1946). The legal sufficiency of that claim is a separate matter, which the district court did not reach. Whether or not a cause of action in favor of the plaintiffs against the NRC, implied from the Constitution, and seeking protection from irreparable harm pendente lite, could be adjudicated by the NRC is at least doubtful, if for no other reason than that its arsenal of remedies includes only those specified in the Atomic Energy Act. Preliminary injunctive relief to prevent irreparable unconstitutional injury is not among those remedies. Whether NRC has adjudicatory competence to consider constitutional claims at all is a matter we need not reach.[14] As a judicially created doctrine, the requirement of exhaustion has traditionally been waived in three circumstances under the case law of this circuit. We have declined to require exhaustion when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights,

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[14] *See Weinberger v. Salfi,* 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975).

First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 697 (3d Cir. 1979); *Barnes v. Chatterton,* 515 F.2d 916, 920 (3d Cir. 1975), when resort to administrative procedures is "clearly shown to be inadequate to prevent irreparable injury," *Babcock and Wilcox Co. v. Marshall,* 610 F.2d 1128, 1138 (3d Cir. 1979), *quoting American Fed'n of Gov't Employees, Local 1004 v. Resor,* 442 F.2d 993, 994-95 (3d Cir. 1971), or when exhaustion is "futile," *United States ex rel. Marrero v. Warden, Lewisburg Penitentiary,* 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds,* 417 U.S. 653, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974). The plaintiffs' present allegation of irreparable harm to their constitutional right to "life and liberty" meets the irreparable harm standard. *Cf. Honicker v. Hendrie,* 465 F.Supp. 414, 419-20 (M.D.Tenn. 1979), *aff'd and opinion of district court adopted,* 605 F.2d 556 (6th Cir. 1979) (noting that if plaintiff had shown irreparable harm under Atomic Energy Act before available agency action "the court would not feel constrained by the doctrine of primary jurisdiction and would not hesitate to act to protect plaintiff's rights"). Although we have held that, under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), fourth amendment claims are subject to the exhaustion requirement, those holdings do not suggest the same conclusion here. In those cases exhaustion is required because the Occupational Safety and Health Review Commission "is the *only* tribunal available for the development of a factual record." *Bethlehem Steel Corp. v. OSHRC,* 607 F.2d 1069, 1074 (3d Cir. 1979) (emphasis added); *Babcock & Wilcox Co. v. Marshall,* 610 F.2d 1128, 1137, 1140 (3d Cir. 1979); *Marshall v. Whittaker Corp.,* 610 F.2d 1141, 1148 (3d Cir. 1979); Because the district court is an available forum for creation of a factual record in the instant case, and is the only forum in which the claim of irreparable harm can be addressed, we hold that it is the appropriate forum for the presentation of these constitutional claims. Thus we conclude that the district court erred in assuming that Count IV states a claim within the exclusive jurisdiction of the NRC.

Since it is entirely possible that any relief to which the defendants may be entitled can be awarded on statutory grounds under Count I or Count III, it may be unnecessary for the district court, and thus for this court, to determine whether Count IV states a claim upon which relief, implied directly from one or more of the several constitutional provisions relied upon, may be granted. Consistent with the policy against premature adjudication of constitutional law questions, we hold no more than that the district court has subject matter jurisdiction over Count IV.

VI. Conclusion

Pervading the treatment of the case by the district court, as well as the briefs of appellees, is the notion that the judge-made rule of exhaustion of administrative remedies bears upon the subject matter jurisdiction of the district court. That error is fundamental. Congress can, of course, limit the subject matter jurisdiction of the district courts, and can relegate some matters to the exclusive jurisdiction of an administrative agency. It can also prohibit private enforcement of federal statutes. In Part II, *supra,* we hold that in the Atomic Energy Act it did both. Where, however, Congress has not given any such clear indication, judge-made rules, such as the requirement of exhaustion of administrative remedies, cannot affect the subject matter jurisdiction of the district courts, but affect only the timing, and in some cases the merits, of the claim for relief. *See generally* K. Davis, Administrative Law of the Seventies § 20.01 (1976). Determining whether the judge-made rule requiring exhaustion of administrative remedies should be relied upon in a given instance to delay or deny a remedy otherwise available from a court requires a careful analysis of the statutory scheme relied on by the plaintiff, of the completeness or incompleteness of remedies available from the agency, of the presence or absence of harm pendente lite, and of the likely intention of Congress with respect to

private enforcement. Such analysis is not likely to be thorough if it is attempted at the outset on a motion to dismiss under Rule 12, Fed.R.Civ.P. 12.

The judgment appealed from will be affirmed insofar as it dismissed Count II of the complaint. In all other respects, it will be reversed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2446

SUSQUEHANNA VALLEY ALLIANCE, DAVIS, Ronald L., TOMPKINS, Betty, HESS, Beverly M. SNELL, Doreen E., *Appellants*

vs.

THREE MILE ISLAND NUCLEAR REACTOR, GENERAL PUBLIC UTILITIES, METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., NUCLEAR REGULATORY COMMISSION, HENDRIE, Joseph A., DIECKAMP, Herman, CREITZ, Walter M., VERROCHI, W. A., BARTNOFF, Shepard

(D.C. Civil No. 79-0658)

On Appeal From The United States District Court For The Middle District Of Pennsylvania

Present: GIBBONS, HIGGINBOTHAM and SLOVITER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on November 13, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 12, 1979, be, and the same is hereby affirmed insofar as it dismissed Count II of the complaint, and in all other respects the said judgment is reversed in accordance with the opinion of this Court.

ATTEST:
[signature illegible]
Clerk

March 17, 1980

APPENDIX C

UNITED STATES DISTRICT COURT, M. D. PENNSYLVANIA

Civ. A. No. 79-658

SUSQUEHANNA VALLEY ALLIANCE, Ronald L. Davis, Betty Tompkins, Beverly M. Hess, Doreen E. Snell,

Plaintiffs,

v.

THREE MILE ISLAND NUCLEAR REACTOR, General Public Utilities, Metropolitan Edison Company, Jersey Central Power & Light Co., Pennsylvania Electric Co., Nuclear Regulatory Commission, Joseph A. Hendrie, Herman Dieckamp, Walter M. Creitz, W. A. Verrochi, Shepard Bartnoff,

Defendants.

October 12, 1979

MEMORANDUM

RAMBO, *District Judge.*

This case is a sequel to the nuclear accident which occurred on March 28, 1979, at Unit No. 2 of the Three Mile Island (TMI) nuclear power plant. The island on which the power plant was built is in the Susquehanna River near Harrisburg, Pennsylvania. As a result of the accident, there are several hundred thousand gallons of radioactively contaminated water in the containment building of Unit No. 2 and in tanks in auxiliary buildings. The water is of varying levels of contamination. The dispute at hand concerns the steps being taken to dispose of the contaminated water.

Plaintiff, Susquehanna Valley Alliance, was formed in 1979 to preserve and protect the environmental quality of the Susquehanna River and the surrounding area. The

individual plaintiffs live in Lancaster County, downstream from the damaged reactor. They allege that they drink and bathe in water whose source is the Susquehanna.

Plaintiffs fear that the treatment technology available to deal with the contaminated water problem may not be adequate to decontaminate the liquid without high risks of additional releases of radioactive pollutants into the air and water. As a result of these fears, a suit was filed on May 25, 1979, against the reactor itself, the Nuclear Regulatory Commission (NRC), the private companies which own TMI (General Public Utilities Corporation, Metropolitan Edison Company, Jersey Central Power and Light, and Pennsylvania Electric Company), and several individuals in decision making positions with either NRC or the private companies.

It is undisputed that the private defendants have proceeded with the construction of a system, known as Epicor II, which is designed to treat the intermediate level contaminated water. Highly contaminated water will be treated by another system which is still in the study and design stage. NRC did not require the private defendants to apply for a construction permit prior to building Epicor II, nor has it yet determined if the private defendants must apply for a modification of their license before operating Epicor II.

The complaint contains four counts which set forth the following claims. Count I charges that the steps being taken to deal with the radioactive wastes at TMI are major federal actions within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.* NEPA requires that, whenever the federal government plans to take action which may have an impact on the environment, the agency contemplating the action study and report on the potential environmental impact of the planned activity. 42 U.S.C. § 4332. Because the waste water processing and disposal activity is claimed to be with-

in the scope of NEPA, plaintiffs request that the court declare that the defendants are in violation of NEPA, and compel NRC to prepare an environmental impact statement.

Count II deals with NRC regulations and parts of the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.* It is plaintiffs' contention that, under the statute and regulations, NRC should have required the nuclear plant operators to apply for a construction permit prior to building Epicor II, and should require that TMI's license be amended before permitting Epicor II to operate. The court is asked to declare that the defendants are in violation of the Atomic Energy Act and to enjoin activities related to the disposal of high level radioactive water until both the utilities and NRC comply with all applicable federal statutes.

Count III states that the defendants will violate Section 301(f) of the Clean Water Act of 1977, 33 U.S.C. § 1311(f), because "high level radioactive pollutants may be discharged into the river" through failure of the pollution control technology to treat these wastes. Count IV raises constitutional issues. It charges NRC with violations under the first, fifth, ninth, tenth and fourteenth amendments which allegedly protect plaintiffs' right "to be born and to live mentally and physically unimpaired."

On the same day that the present action was filed, NRC issued a statement directing its staff to prepare an environmental assessment dealing with proposals to decontaminate and dispose of radioactively contaminated waste water at the TMI facility. In that statement, NRC declared that:

> [t]he assessment should include discussion of potential risks to the public health and safety, including occupational exposures and the risk of accidental releases, and a discussion of alternatives to the Epicor II system.

The NRC directive ordered that, until the assessment on *processing* the intermediate radioactive waste water was completed, and the public had been given an opportunity to comment on the staff report resulting from the assessment, the licensee was not to operate Epicor II for other than testing purposes. NRC permitted the testing to proceed on the condition that only nonradioactive water was to be utilized in the trial operations.

The first phase of the environmental assessment was released on August 14, 1979. The report concluded that the proposed use of Epicor II for the *processing* of the intermediate radioactive wastes in the TMI-2 auxiliary building would not significantly affect the quality of the human environment. Therefore, the NRC staff recommended that no environmental impact statement be prepared for the processing stage related to intermediate level contamination. The assessment, and the conclusion regarding an environmental impact statement are subject to a period of comment by the public and other federal agencies. *See* 44 Fed.Reg. 48829 (August 20, 1979). Then NRC will decide whether to adopt the staff recommendation and allow Epicor II to process the intermediate level waste water.

Reports assessing the environmental consequences of *disposal* of the intermediate level processed contaminated water and the processing and disposal of the highly radioactive water have yet to be released. They also will be subject to public scrutiny prior to adoption by NRC.

Both NRC and the private defendants filed motions to dismiss the case for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction in this court.[1] They contend that Count I should be

[1] The federal defendants had previously filed a motion to transfer venue pursuant to 28 U.S.C. § 1404(a). At the time the motion to dismiss was filed, the court had not addressed the venue motion. Since the court concludes that it has no subject matter jurisdiction over the action, transfer to another district would be inappropriate.

dismissed as moot because NRC has undertaken an environmental assessment of the actions related to the cleanup operations at TMI-2. With regard to the issues raised in all four counts, defendants urge that this court lacks subject matter jurisdiction because plaintiffs must first exhaust their administrative remedies by seeking through NRC the relief sought in this court. Should NRC render a decision adverse to plaintiffs, defendants believe those decisions would fall within the meaning of "final licensing" orders, and contend that jurisdiction to consider a contested NRC ruling is in the court of appeals, not the district court.

In order to decide if the defendants are correct in stating that plaintiffs have failed to exhaust their administrative remedies, the court must determine what administrative remedies, if any, are open to plaintiffs. The first question to consider is whether or not plaintiffs have standing to seek NRC action. Under the following NRC regulation, groups or individuals with concerns similar to plaintiffs have a right of recourse to the Commission:

10 C.F.R. Section 2.206

> (a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. . . .
>
> (b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director Office of Inspection and Enforcement, as appropriate shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no pro-

> ceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.
>
> (c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty (20) days after the date of a Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion.

The quoted regulation allows plaintiffs to ask NRC for all the relief sought in this court. The phrase "or for such other action as may be proper" gives latitude to challenge a variety of activities related to the construction and possible use of Epicor II and future deconstamination equipment. The acts complained of in Count II will be reviewed by NRC if plaintiffs request that NRC determine whether or not the operation of Epicor II should be subject to a licensing amendment. Should NRC determine that a licensing amendment is appropriate, then the Commission's environmental regulations will have to be followed. *See* 10 C.F.R. §§ 51.5 through 51.26.

If plaintiffs desire a more comprehensive environmental analysis than that which NRC has agreed to provide, the breadth of the regulation would permit a request for an integrated environmental impact statement on the entire decontamination process. Thus, Count I, if not moot, is subject to the exhaustion requirement.

Count III, which is tenuous at best because it is based on a possible future action, is also subject to the exhaustion principle. Plaintiffs may request a proceeding to determine whether there is a danger that the decontamination process will result in the discharge of high level radioactive pollutants into the river. Similarly, Count IV is subject to administrative review before it may be considered by the

court. It is within the Commission's expertise to determine what health hazards, if any, are posed by the recovery activities at TMI.

If NRC refuses to institute proceedings requested under 10 C.F.R. § 2.206, or, if plaintiffs elect to challenge a final order resulting from proceedings held by NRC, plaintiffs have a right of appeal. Congress designated the forum of review of certain final orders of NRC when it enacted 28 U.S.C. § 2342, which provides:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . . . .
>
> (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of Title 42 . . . .[2]

Section 2239 of Title 42 of the United States Code makes reviewable:

> [A]ny proceeding under this chapter for the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control, and . . . any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees . . . .

The jurisdiction vested by the two quoted sections of Title 42 has allowed the courts of appeals to review a variety of NRC decisions which are relevant to the relief sought by plaintiffs. A determination by NRC that it would not institute a proceeding, sought under 10 C.F.R. § 2.206, to "modify, suspend or revoke" a special nuclear material

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[2] The Atomic Energy Commission was abolished in 1974. Title 42 U.S.C. § 5841(f) transferred to NRC "all licensing and related regulatory functions of the Atomic Energy Commission."

license was considered by the Seventh Circuit Court of Appeals. *People of the State of Illinois v. Nuclear Regulatory Commission,* 591 F.2d 12 (7th Cir. 1979).

In another case NRC decided that a particular project did not fall within its licensing authority. That final order was reviewed by the Court of Appeals for the District of Columbia. The court stated that it was reviewing NRC's determination on licensing jurisdiction directly, rather than reviewing a district court's prior ruling on the same issue, because the district court lacked jurisdiction to review the question of NRC's licensing jurisdiction. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,* 196 U.S.App.D.C. 354, 606 F.2d 1261 (D.C. Cir. 1979). Thus, if plaintiffs request that NRC either assert licensing jurisdiction over the recovery activities, or that it change the present status of the license for TMI-2, a decision on those requests would be reviewable in the court of appeals. Similarly, if NRC decides that the operation of Epicor II should be subject to a licensing change, the court of appeals could review the sufficiency of NRC's consideration of environmental factors during the licensing proceedings. *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978); *Coalition for Safe Nuclear Power v. United States Atomic Energy Commission,* 150 U.S.App.D.C. 118, 463 F.2d 954 (D.C.Cir. 1972).

It is a well established principle of law that a plaintiff must seek redress of grievances with the appropriate administrative agency, in this case NRC, prior to asking the court to take action on matters within the jurisdiction of an agency. *Coalition for Safe Nuclear Power, supra.* This requirement has developed to prevent premature interference with agency processes, and to allow the agency the opportunity to review its own decisions. *Weinberger v. Salfi,* 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

Plaintiffs acknowledge the doctrine of exhaustion of administrative remedies, but contend that this case is subject to certain exceptions to that doctrine. Citing *City Bank Farmers Trust Company v. Schnader,* 291 U.S. 24, 54 S.Ct. 259, 78 L.Ed. 628 (1934), for the principle that exhaustion is not required when seeking an administrative remedy would be futile, plaintiffs claim that recourse to NRC would be futile. The present case is not factually similar to *City Bank.* In *City Bank* the executor of an estate was challenging an inheritance tax assessed by the Commonwealth of Pennsylvania. Plaintiff had been in direct contact with appropriate authorities who had orally advised him that his claim of nontaxability would be denied. The court recognized the futility of forcing the plaintiff to await confirmation of that denial when he would simply have to file suit again. In the present case plaintiffs do not allege that they have had any communications with NRC, in spite of the fact that the NRC regulations recognize and provide for the right of concerned citizens to question NRC decisions. They argue that the fact that NRC did not require the reactor owners to apply for a construction permit before the building of Epicor II demonstrates the futility of approaching the agency for relief.

The situation created by the accident at TMI is highly complex. NRC may well have been acting in accord with the totality of its regulatory obligation when it allowed the construction of Epicor II to proceed. That decision does not indicate the futility of the definite nature which is necessary to allow a court to bypass the prerequisite of exhaustion of administrative remedies. It would be an unjustified interference with NRC authority for this court to intervene in the present instance, when the agency itself may decide to grant plaintiffs the relief they seek.

The second theory which plaintiffs advance to skirt the exhaustion rule is that NRC has violated clear, nondiscretionary legal duties. First they charge that, because NRC

has not issued an environmental impact *statement* regarding the proposed recovery operations at TMI-2, NRC has disregarded the mandates of the National Environmental Policy Act.[3]

Plaintiffs rely on *Izaak Walton League of American v. Schlesinger*, 337 F.Supp. 287 (D.D.C.1971). In *Izaak Walton* the United States District Court for the District of Columbia did find that it had jurisdiction to consider a claim that the Atomic Energy Commission (AEC) had violated a clear, nondiscretionary statutory mandate under NEPA. The AEC had revised its regulations to permit the issuance of an interim operating license for a nuclear power station prior to the preparation of a NEPA statement.[4]

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[3] The issue of whether a district court may exercise concurrent jurisdiction because a violation of NEPA is alleged was decided in *City of Rochester v. Bond*, 195 U.S.App.D.C. 345, 603 F.2d 927 (D.C.Cir. 1979). The court rejected the thesis that a district court could exercise concurrent jurisdiction because the complaint alleged a NEPA violation. The following reasoning is equally applicable to the present case:

> The rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts. The choice of forum is, as we have said, for Congress and we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged. The policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals. The likelihood of duplication and inconsistency would exist in either case. [At p. 354, 603 F.2d at p. 936].

[4] Under current NRC regulations a NEPA statement is published after an environmental evaluation. It may take the form of a full scale environmental impact statement, or may be what is termed a negative declaration. i.e. a statement that, because the contemplated action will have no significant effect on the environment, no environmental impact statement will be prepared. Either form of NEPA statement is available to the public. *See* 10 C.F.R. §§ 51.1-51.52.

No interim license had been issued, but the court held that finality was established by the regulations themselves which did not require an evaluation of environmental factors before interim licensing. In that case the court was not called upon to make a judgment on the sufficiency of the consideration of environmental factors, but rather had to decide whether the AEC regulations were in violation of NEPA.[5]

NRC's supervision of the recovery operations at TMI-2 presents a different set of facts. NRC has prepared an environmental assessment concerning the *processing* of the intermediate level waste water by Epicor II. It is under court order to do an environmental assessment on the other phases of the recovery. Thus NRC is complying with NEPA because it is evaluating the environmental consequenses of its actions. The sufficiency of that compliance is a separate issue. In *Izaak Walton* AEC had made a decision, via its regulations, not to do this basic evaluation. That was the violation of a clear, nondiscretionary duty which vested the district court with jurisdiction. Here there is no comparable, clear nondiscretionary duty.

Plaintiffs further contend that by allowing the construction of Epicor II without requiring the reactor owners to apply for a construction permit NRC has violated another clear, nondiscretionary duty. They claim that, if NRC decides to allow the processing of the contaminated water

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[5] In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 196 U.S.App.D.C. 354, 606 F.2d 1261 (D.C.Cir. 1979), the court of appeals recognized the jurisdiction of a district court to consider the sufficiency of a NEPA evaluation made by the Energy Research and Development Administration. However, as the court noted in footnote thirteen, the Energy Research and Development Administration is not subject to a special statutory review proceeding as is NRC. Thus, Congress had not divested the district court of jurisdiction over ERDA proceedings as it has in the case of NRC.

prior to compelling the owners to obtain an amendment to their operating license, an additional violation of a clear, nondiscretionary duty will occur. The court does not agree with those propositions. Not all construction, nor every alteration at a nuclear power plant requires a construction permit. Neither is it obvious, under the existing statute, that an operating license amendment must be obtained before Epicor II may process the waste water. The technical expertise needed to evaluate whether or not the recovery activities are subject to permits or licensing amendments exists within NRC.[6] That is the agency designated by Congress to regulate the nuclear industry, the district court is not. Congress has provided that NRC's licensing decisions may be reviewed by the courts, but it has vested that power in the court of appeals. Certainly, given the technical nature of the factors NRC must weigh in making its licensing decisions, this court is not in a position to declare that NRC has violated a clear, nondiscretionary duty.

The exceptions to the exhaustion doctrine do not apply to the facts of this case. The relief plaintiffs seek must be requested from NRC. Only after NRC has issued a final order with respect to the request will it be ripe for consideration by the courts. Because plaintiffs have failed to exhaust their administrative remedies, the complaint is dismissed for lack of subject matter jurisdiction, but without prejudice to plaintiffs' right of recourse to the Nuclear Regulatory Commission.

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[6] NRC must decide whether an alteration is involved constituting a change from the technical specifications previously incorporated in the license (10 C.F.R. § 50.54(n)); whether an "unreviewed safety question," as defined in NRC regulations, is involved (10 C.F.R. § 50.59(a)); whether a "significant hazards consideration" is involved (10 C.F.R. § 50.91); or whether a "material alteration of a licensed facility" is involved (10 C.F.R. § 50.91).

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-119

GENERAL PUBLIC UTILITIES, ET AL., *Petitioners*,

v.

SUSQUEHANNA VALLEY ALLIANCE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9, 1980.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the
Supreme Court of the
United States

Dated this 4th day of August, 1980.

APPENDIX E

STATEMENT

The staff is directed to prepare an Environmental Assessment regarding proposals to decontaminate and dispose of radioactively contaminated waste water from the Three Mile Island facility. The Assessment will be divided into several portions. The first portion of the Assessment will deal with the proposed decontamination of intermediate-level waste water using the EPICOR-II system at TMI. The Assessment should include discussion of potential risks to the public health and safety, including occupational exposures and the risk of accidental releases, and a discussion of alternatives to the EPICOR-II system. Pending completion of this portion of the Assessment and opportunity for public comment, the staff should direct the licensee not to operate the EPICOR-II system. Testing of the EPICOR-II system without using contaminated waste may proceed. Except for discharge of waste water decontaminated by the existing EPICOR-I decontamination system [1] and discharge of industrial waste water [2] as consistent with the facility operating licenses, no discharge of waste water shall be permitted until completion of a second portion of the Assessment dealing with any such proposed discharges. This portion shall include a discussion of alternatives to discharge into the Susquehanna River. The decontamination and disposal of high-level waste water will be the subject of a subsequent Assessment. However, the Director

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[1] Primarily pre-accident waste water from Unit 1 which has been partially contaminated by water from Unit 2, with an activity level of less than 1 microcurie per cc. prior to treatment and with an activity level approximately 10^{-7} microcuries per cc. in the discharge canal after treatment.

[2] Waste water slightly contaminated (approximately 10^{-7} microcuries per cc.) due to leakage from secondary plant service support systems. The discharge of this industrial waste water is necessary to maintain TMI Unit 2 in a safe condition.

of the Office of Nuclear Reactor Regulation may authorize measures deemed necessary to cope with an emergency. If the Director of the Office of Nuclear Reactor Regulation believes the public health and safety requires the use of the EPICOR-II system, prior to completion of the first portion of the Assessment, he shall so report to the Commission and the Commission may then permit use of the system. The staff should inform the Commission promptly regarding its estimated schedule for completing each portion of the Assessment and for completing the entire Assessment.

For the Commission

/s/ Samuel J. Chilk
Secretary of the Commission

Dated at Washington, DC, this 25th day of May 1979.

APPENDIX F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Docket No. 50-320

COMMISSIONERS:

Joseph M. Hendrie, Chairman, Victor Gilinsky, Richard T. Kennedy, Peter A. Bradford, John F. Ahearne

In the Matter of

METROPOLITAN EDISON COMPANY, *et al.*
(Three Mile Island Nuclear Station, Unit 2)

MEMORANDUM AND ORDER

Because of the March 28, 1979 accident at the Three Mile Island Unit 2 nuclear power plant (TMI-2), substantial amounts of radioactively contaminated waste water have been collected in tanks at the facility. As the initial step in a program to deal with this accumulation, the Commission's technical staff has recommended that Metropolitan Edison Company, the licensee for Three Mile Island, be permitted to operate an EPICOR-II filtration and ion exchange decontamination system to decontaminate intermediate-level radioactive waste water now held in tanks in the TMI-2 auxiliary and fuel handling building. This recommendation is accompanied by the staff's environmental assessment of the impact of using EPICOR-II and an analysis of comments on the assessment by the public. The staff has concluded, based on this assessment and analysis, that the proposed use of EPICOR-II will not significantly affect the environment and therefore that no environmental impact statement need be prepared prior to authorizing the licensee to operate EPICOR-II. The Commission is now called upon to decide whether the requirements of the National Environmental Policy Act (NEPA) have been met

with regard to the proposed use of EPICOR-II and, if so, whether the licensee should be directed to operate the system.[1]

BACKGROUND

There are three major volumes of radioactively contaminated waste water accumulated at Three Mile Island Unit 2 (TMI-2) as a result of the accident in March 28, 1979. These include approximately 630,000 gallons contained in the lower levels of the reactor containment building, 85,000 gallons in the reactor coolant system in use to remove decay heat from the reactor core, and about 387,000 gallons stored in tanks in the auxiliary building. The waste water stored in the auxiliary building has a total radioactivity concentration less than 40 microcuries/milliliter and is referred to as intermediate-level waste water. The radioactivity concentrations of waste water in the reactor building and in the primary coolant systems have been measured at greater than 100 μCi/ml for some isotopes. This waste water is referred to as high-level waste water.

Principally because of leakage from the primary reactor coolant system, the volume of water in the reactor containment building is increasing in volume by about 430 gallons per day, equivalent to a level increase of about 2 inches per month. The present height is about 7½ feet above the basement floor in the containment building. Since no paths of leakage to the outside have been identified, decontamination of this water is not at present an urgent problem. The situation is different with respect to the intermediate-level waste water now stored in the auxiliary building. The

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[1] This decision does not address the subject of disposal of the decontaminated water. Pursuant to the Commission's Statement of May 25, 1979, discharge of TMI waste water is not permitted, with certain exceptions set out in the Statement, pending completion of an environmental assessment dealing with such discharges.

inventory of this water is increasing at the rate of about 800-1000 gallons per day.[2] Remaining capacity in the auxiliary building tanks as of the end of September 1979 was about 29,000 gallons. Thus there is a pressing need to deal with the intermediate-level waste water. In addition to the problem of inadequate storage capacity, the retention of contaminated water in the auxiliary building contributes to the occupational exposure of workers at the TMI site. The continued safe shutdown of TMI-2 depends upon the use of equipment located in the auxiliary building. Approximately 50 workers per day are currently admitted to the auxiliary building to perform necessary decontamination, operations, and construction activities. Occupational exposure to these workers as a group, primarily as a result of radiation from the stored water, averages about 15 man-rem per month.

The licensee has developed a procedure to decontaminate the intermediate-level waste water using the EPICOR-II filtration and ion exchange system constructed at TMI-2 following the March 28, 1979 accident. Decontamination would be an effective response to the problems identified above, since the processed water would not be a source of significant occupational exposure and could be readily stored in unshielded tanks outside the auxiliary building. Successful operation of EPICOR-II will serve to transfer the significant radioactive contaminants from a mobile form (suspension in water) to a fixed form (held in filter and ion exchange resin materials).

In a Statement dated May 25, 1979 the Commission directed its technical staff, pursuant to NEPA, to prepare

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[2] The dominant source of this increase is leakage from the component evaporative cooling system, the demineralized water system, and the reactor building cooling system, and from recirculation of water in the tanks prior to sampling. Most of this leakage is non-contaminated water which becomes contaminated while passing through auxiliary building floor drains and sumps provided to collect the leakage.

an environmental assessment of the use of EPICOR-II. Pursuant to this Statement, the licensee was not permitted to operate EPICOR-II pending completion of the assessment and opportunity for public comment, except for testing with uncontaminated water. The staff's assessment, "Use of EPICOR-II at Three Mile Island, Unit 2," NUREG-0591, was issued for public comment on August 20, 1979. See 44 *Fed. Reg.* 48829. The assessment concluded that the proposed use of EPICOR-II would not significantly affect the quality of the environment and that accordingly NEPA does not require preparation of an impact statement prior to permitting EPICOR-II to operate.

Some 40 comments were received. In written analyses of the comments and oral discussion at open Commission meetings on October 4 and October 10, 1979, the staff responded to these comments and reaffirmed its conclusion that the environmental effects of operating EPICOR-II as proposed would be insignificant. See revised NUREG-0591, dated October 3, 1979. The public comments, the documents submitted to the Commission by the staff, and transcripts of the October 4 and October 10, 1979 meetings are included in the administrative record and form the basis for the Commission's decision on this matter.[3]

IMPACT OF EPICOR-II

Based on Commission review of the facts and analysis in the staff's environmental assessment and written and oral discussion of the comments, the Commission has determined that the proposed operation of EPICOR-II will not have a significant effect on the environment. Pursuant to 10 CFR 51.7 and 51.50(d) the staff is directed to issue a

[3] With respect to the transcripts of the October 4 and October 10, 1979 meetings, the Commission has waived its usual rule that statements at an open meeting are not part of the record of decision of the matters discussed therein. 10 CFR 9.103.

negative declaration stating that an environmental impact statement for the proposed action will not be prepared.

In reaching this conclusion the Commission has taken note of comments which argue that the Commission has violated NEPA by considering the impact of EPICOR-II separately and apart from the overall impact of a complete program for decontamination of TMI-2. The Commission does not believe this "illegal segmentation" argument is well-founded in this case. In meeting NEPA requirements an agency may focus on the impact of a single action, even when it is arguably a segment of a larger program, when the action in question has independent utility. See *e.g.*, *Lookout Alliance* v. *Volpe*, 484 F.2d 11 (8th Cir. 1973); *Friends of the Earth* v. *Coleman*, 513 F.2d 295 (9th Cir. 1975). The Commission finds that use of EPICOR-II meets this test.[4]

The independent utility of EPICOR-II is emphasized by the fact that decontamination of the intermediate-level water appears by a considerable margin to be the best available response to the impending accumulation of intermediate-level waste water in excess of adequately shielded storage capacity. The alternative to decontamination would be to find additional storage facilities, but problems with

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[4] In this regard, by letter of October 10, 1979, the Council on Environmental Quality asked to meet with the Commission to discuss its concerns about prospective radioactive cleanup operations at the Three Mile Island Unit 2 reactor. Our respective General Counsels and members of their staffs met on October 11 to discuss these matters. In an exchange of letters with the Commission dated October 15 and October 16 and based on the assurances made in the NRC letter, the Council found that the prompt decontamination of the intermediate-level waste water through the EPICOR-II system is an operation necessary to control the immediate impacts of an emergency situation (40 CFR § 1506.11). In so doing, however, the Council did not reach those questions concerning the legality of the Commission's actions thus far under NEPA. These letters are part of the administrative record on which the Commission has reached its decision.

this alternative are severe. Construction of new tanks with the necessary shielding would require several months, at least, and could not be accomplished before the auxiliary building tankage capacity is exceeded. Other than decontamination, there are at present only two timely alternatives available to provide suitably shielded storage space for the intermediate-level waste water, once the auxiliary building tanks are filled. One alternative would be to transfer the water to tanks at Unit 1. This action would significantly raise the contamination level of piping and tankage in Unit 1 and extend the scope of the problem of occupational exposure. The other, even less desirable, alternative would be to transfer the intermediate-level water to the TMI-2 reactor building, mixing it with the higher-radiation-level water presently in the containment, raising the height of that water and in effect increasing by almost 50% the amount of water which must subsequently be decontaminated by systems yet to be developed to handle high-level waste water. Both of these alternatives in effect would enlarge rather than reduce the spread of radioactive contamination and would involve potentially significant safety questions and environmental impacts.

The Commission has thus concluded that prompt decontamination of the intermediate-level water by EPICOR-II is the best response to the situation. The use of this system will immobilize most of the radioactivity presently dispersed in the intermediate-level water, which requires large storage volumes and involves at least some possibility of leakage, by transferring this radioactivity to the compact, more easily stored EPICOR-II resins, thereby reducing the potential hazard to workers and the public of an excessive accumulation of intermediate-level waste water. Decontaminated water which has been cycled through EPICOR-II can be readily stored in convention, unshielded tanks while disposal options are considered without any pressing time constraint. These benefits of EPICOR-II operation, together with the reduction of occupational exposure to work-

ers in the auxiliary building, establish the independent utility of the system,[5] thereby confirming that pursuant to NEPA environmental aspects of EPICOR-II may be evaluated separately from an overall programmatic analysis of cleanup at TMI-2.[6]

Another objection to the scope of the environmental assessment made in some of the comments is that the environmental assessment did not consider psychological impacts. Without deciding whether NEPA requires the consideration of such impacts, the Commission notes that use of EPICOR-II would provide no objective reason for concern and there is no indication in the comments received that the prospect of EPICOR-II operation, as distinct from release of water, has in fact occasioned public alarm or fear. Several of the commenters did indicate great concern with regard to possible discharge of processed waste water into the Susquehanna, but such disposal activities are separate from EPICOR-II operation and lie outside the scope of the assessment. The Commission stresses again that decontamination by EPICOR-II will not of itself result in any waste

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[5] Another criterion for permitting segmentation is that the proposed action will not foreclose subsequent alternatives. Decontamination of the water in the auxiliary building will not foreclose any alternatives with regard to subsequent processing or disposal options. Rather, such decontamination may reasonably be viewed as a prerequisite to a variety of alternative actions which may subsequently prove necessary and desirable in cleaning up TMI-2.

[6] Whether a programmatic impact statement for the overall cleanup of TMI-2 may eventually be required is an issue the Commission need not address at the moment. It seems clear that no such statement is required at present because TMI-2 cleanup is a project in contemplation and is not yet a formal agency proposal. The Supreme Court has stated that an agency need not have a final impact statement ready until "the time at which it makes a recommendation or report on a *proposal* for federal action." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in the original).

water discharges, and the question whether discharges should later be approved is in no way prejudged by permitting use of EPICOR-II.

With regard to the many technical issues concerning EPICOR-II that were raised by the substantive comments, the Commission, as previously noted, has found the staff's responses adequate. Many of the doubts about EPICOR-II expressed by commenters were not relevant to the question at issue in the environmental assessment, which is whether operating EPICOR-II will have a significant environmental impact. Some comments, for example, questioned whether EPICOR-II will in fact achieve the decontamination levels expected by the staff. In the Commission's judgment, we expect that EPICOR-II will be able to remove at least 99% of the radioactive contamination from the intermediate-level waste water the system will process. But that aside, the details of the system's performance do not bear on the conclusion that EPICOR-II does not require an environmental impact statement to justify its use. For NEPA purposes, once it is determined that the proposed action will have no significant impact, no impact statement is required. As noted, the Commission believes the staff's performance expectations for EPICOR-II are reasonable, but even if these expectations are not met, additional decontamination by recycling through EPICOR-II or, if necessary, by other methods would in no way be foreclosed.[7]

One aspect of the proposed EPICOR-II operation requires further attention here. It is the Commission's view

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[7] An alternative decontamination technology frequently mentioned in the comments is the evaporation method. Because an evaporation system is not presently available for use at TMI-2, this technology is not a realistic alternative in the present situation, in view of the need for prompt action. The Commission notes that the evaporator method has significant drawbacks, notably the fact that the highly radioactive sludge remaining after evaporation is in liquid form and may well be more difficult to dispose of than the resins and filters of the EPICOR-II system.

that solidification of the EPICOR-II radioactive waste products (filter and ion-exchange resin materials) prior to offsite shipment will contribute to improved safety during transportation and to the ease of final disposal. Accordingly, the Commission concludes that the licensee should be directed to construct expeditiously the necessary facilities for solidification and to store EPICOR-II wastes at TMI-2 until the resins have been properly solidified.[8] There should be no shipment of non-solidified wastes offsite unless necessary to allow waste water decontamination to continue or unless otherwise required to protect public health and safety.

ATOMIC ENERGY ACT REQUIREMENTS

We now move to the question whether the Atomic Energy Act authorizes the Commission to direct prompt operation of EPICOR-II.[9] For the reasons stated below, we conclude that it does.

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[8] A staff memorandum to the Commission, dated October 12, 1979 included in the record of this proceeding, indicates that unavoidable occupational exposure associated with the solidification process can be kept to acceptable levels. Although no specific facility designs have been developed for the solidification operation at TMI-2, the staff reviewed three topical reports on systems of this type which show that routine maintenance and operation activities are expected to result in an occupational dose of less than 10 man-rem per year. Solidification of resins from EPICOR-II, which has not been specifically designed to accommodate solidification, will likely involve design features not previously analyzed by the staff. Further, resins from EPICOR-II will be more radioactive than the average from an operating plant. However, the staff judgment was that solidification of EPICOR-II resins developed from decontamination of the auxiliary building water would result in occupational exposure levels similar to those of systems previously reviewed if no unusual problems were encountered, and that a best estimate upperbound for the operation would be 25 man-rem.

[9] One of the commenters has argued that construction of EPICOR-II without a construction permit violated the Atomic Energy Act. We do not think that construction of EPICOR-II,

Our earlier discussion about the accumulation of contaminated water at TMI Unit 2 indicates that public health and safety requires that some action be taken to deal with the intermediate-level waste water, and that the timely alternatives to EPICOR-II operation all present health and safety problems. Although no action which involves the handling of radioactive materials can be found inherently free of all risk, the evaluation of EPICOR-II indicates that no significant health and safety (or environmental) impact will likely result from the proposed operation. We are thus confronted with a situation where some action must be taken to reduce health and safety risks, and an appropriate action to reduce those risks has been identified that itself entails no significant health and safety hazards. Under sections 161b. and i. of the Atomic Energy Act the Commission is empowered to issue such orders affecting activities of licensees as it deems necessary or desirable to protect health and to minimize danger to life or property. Further, every facility license, including the operating license for TMI-2, is expressly subject to further Commission orders. 10 CFR § 50.54(h). An order to the licensee here to promptly begin the process of decontaminating the intermediate-level waste water by operating EPICOR-II would be entirely consistent with the purpose of the Act and regulations.

Some of the public commenters have argued in litigation that the Commission cannot take such action without first holding an adjudicatory hearing under Section 189a. of the

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a minor commitment of resources in a $1 billion facility and unrelated to operation of the reactor itself, is a material alteration of a utilization facility within the meaning of our regulations and therefore requiring a construction permit. 10 CFR 50.91. *See,* Portland General Electric Co. (Trojan Nuclear Plant), LBP-77-70, 6 NRC 1179, 1183 (1977). Beyond this, the NRC staff has monitored the design and construction of EPICOR-II from the beginning, so that there are no serious questions about whether the facility is flawed in some manner that might have been detected if a formal permit proceeding had been held.

Atomic Energy Act to amend the TMI Unit 2 operating license. We find section 189a. inapplicable to the type of order contemplated here. Section 189a. is quite careful in specifying the types of proceedings to which it applies, even going so far as to cite to specific sections of the Act. A proceeding for a Commission order under sections 161b. and i. is not one of the proceedings listed in section 189a. Thus, the plain language of the statute supports the Commission's exercise of authority here. Of course it is possible to argue here that the order alters the licensee's obligation to the Commission, as such has the effect of amending the license, and consequently that a Section 189a. proceeding for such an amendment should be held. We think, however, that the entire thrust of the Atomic Energy Act indicates that Congress intended the Commission to be able to act with dispatch when in its judgment the public health and safety calls for prompt action. Even if for purposes of argument it is assumed that the order constitutes a form of license amendment, the result would be a conflict between the authorization to issue immediate orders necessary to protect health and safety in sections 161b. and i. and the hearing requirement in section 189a. We have no difficulty resolving that conflict in favor of protection of the public health and safety especially where, as here, there has already been a fair opportunity for public participation *in* the form of written comments.

While we conclude that an order for operation of EPICOR-II is not subject to section 189a. of the Act, the licensee itself has due process hearing rights under the Constitution quite apart from section 189a. The law is clear that, given the public health and safety need for prompt EPICOR-II operation, any due process hearing rights can be satisfied by an offer of a prompt hearing after the order for EPICOR-II operation becomes effective. *E.g., Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594 (1950); *Bowles* v. *Willingbaum,* 321 U.S. 503 (1944). And, given that the

licensee is free to request a hearing for purposes of challenging the order, we believe that sound administrative policy in these circumstances dictates that other interested persons be given a similar right. Accordingly, we provide below that the licensee and any other person whose interest may be affected may request a hearing with a view toward lifting or modifying the order, but that the order shall remain effective pending decision in any hearing that may be requested.

One final matter warrants our attention. Operation of EPICOR-II will add several effluent discharge paths to those presently listed in the TMI-2 operating license. As discussed in the staff's environmental evaluation, radionuclide discharges through these additional paths will have no significant impact on the environment. Further, the Commission's regulations in 10 CFR Part 50, Appendix A, Criterion (GDC 64), require that the new discharge paths be monitored. It has been the staff's practice in developing operating license technical specifications to include in the specifications a listing of discharge paths that require monitoring under GDC 64.

It is not necessary to amend the technical specifications to assure that monitoring will be conducted, given the clear requirement of GDC 64 and the provision of 10 CFR § 50.54 (h) that all facility licenses are conditioned on compliance with all applicable Commission regulations. Nevertheless, we believe that the Commission's inspection and enforcement program will be simplified if the requirements for discharge path monitoring are spelled out in a single legal document—the operating license—that can be readily referenced by the licensee and Commission inspectors. For the same reason there is merit in including in the operating license the obligation to operate EPICOR-II and the conditions associated with solidification and shipment of the spent resins. Accordingly, we are proposing to amend the TMI-2 operating license to include these provisions. In light

of our disposition in this regard, and the reasons already discussed as to our authority under Section 161 of the Atomic Energy Act, we need not and do not reach the question whether such a license amendment is required here.

Under section 189a. of the Act, the licensee and other interested persons may request a hearing on this proposed amendment. Given the similarity of issues, hearings requested on this proposed amendment and on the order for EPICOR-II operation will be consolidated.

ORDER

For the reasons stated above, the Commission orders as follows:

1. The licensee shall promptly begin the process of decontaminating the intermediate-level waste water from TMI-2 by operating EPICOR-II. Prior to operation, the licensee shall consult the Director of NRR for approval of the final operating procedures and design and construction details. In order to reduce the inherent risk from the contaminated water most expeditiously and prudently, the licensee should to the extent possible process all the water once through the EPICOR-II system.

2. The licensee shall maintain suitable tankage at TMI-1 that could be used to store waste water from TMI-2 at an appropriate state of readiness, should additional storage capacity become necessary.

3. The licensee shall not ship spent resins offsite unless they have been solidified, and only then with the prior approval of the Director of NRR, provided however, that the licensee may ship non-solidified but dewatered spent resins offsite if it determines, and the Director of NRR concurs, that such shipment is required to assure continued operation of EPICOR-II or otherwise required to protect public health and safety. The licensee shall expeditiously construct

a facility for solidification of the spent resins and shall use such facilities for resin solidification upon receiving the Director of NRR's concurrence with the design and operating procedures.

4. This Order, except as provided by the Commission's Statement of May 25, 1979, does not authorize discharge into the environment of any of the processed or unprocessed waste water, or processing of any waste water other than the intermediate-level waste water. In carrying out the actions directed by paragraphs 1, 2, and 3 of this Order the licensee shall be subject to all applicable Commission regulations.

5. The Director of NRR has been instructed promptly to prepare and issue an order for the modification of the TMI-2 operating license to (a) add EPICOR-II discharge paths to those presently listed in the technical specifications as requiring monitoring under GDC 64, and (b) include the provisions of paragraphs 1, 2, and 3 of this Order. The order shall state that within 20 days of the date of this Order the licensee and any other person whose interest may be affected may request a hearing on the proposed amendment pursuant to 10 CFR § 2.714 to be held prior to the amendment of the license, *i.e.*, not prior to operation of EPICOR-II but rather prior to the adoption of the formal amendment.

6. Within 20 days from today, the licensee may file an answer to paragraphs 1, 2, and 3 of this Order, and the licensee and any other person whose interest may be affected may request a hearing pursuant to 10 CFR § 2.714 for the purpose of challenging all or any part of paragraphs 1, 2, and 3 of this Order. In any hearing that may be requested, the issues will be those within the scope of whether (a) paragraphs 1, 2, and 3 of this Order are necessary and sufficient to protect health and safety or to minimize danger to life or property, and (b) actions directed under paragraphs 1, 2, and 3 would significantly affect the quality of

the human environment. Any hearing that may be requested shall be consolidated with any hearing that may be requested pursuant to the order to be published under paragraph 5. The Commission finds that the public health, safety, and interest require that this Order become effective immediately and shall remain effective notwithstanding the filing of any requests for a hearing.

7. An Atomic Safety and Licensing Board, consisting of Marshall E. Miller, Chairman, and Dr. Richard F. Cole and Dr. Martin J. Steindler, is hereby appointed to rule on any requests for a hearing under paragraph 6, or any requests for a hearing that may be filed in response to the order to be published under paragraph 5, and to preside over any hearing that may be held upon those requests. In conducting any such hearing the Board shall bear in mind that the process of operating EPICOR-II to decontaminate the intermediate-level waste water may take as little as two months. Accordingly, the hearing shall be conducted as expeditiously as possible, and the Board is authorized to immediately stay the effectiveness of all or part of paragraphs 1, 2, and 3 of this Order should it determine, based upon affidavits or such other summary stay procedures it deems appropriate, that this is required in order to protect public health and safety.

It is so Ordered.

For the Commission
/s/ Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C., this 16th day of October, 1979.